

**COMMISSION ON LEGISLATIVE, JUDICIAL AND EXECUTIVE
COMPENSATION**

FINAL REPORT ON JUDICIAL COMPENSATION

December 26, 2019

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MEMBERS OF THE COMMISSION ON LEGISLATIVE, JUDICIAL AND EXECUTIVE COMPENSATION

Michael A. Cardozo is a partner in Proskauer's Litigation Department and the former Corporation Counsel of the City of New York. As the City's 77th and longest serving Corporation Counsel, he was the City's chief legal officer, headed the city's Law Department of more than 700 lawyers, and served from 2002 through 2013 as legal counsel to Mayor Michael Bloomberg, elected officials, the city and its agencies. Michael represents a wide range of clients on general commercial litigation and arbitration matters. He also helps to oversee the firm's pro bono practice and its diversity programs. Prior to becoming Corporation Counsel Michael served as co-chair of Proskauer's Sports Law Practice and handled numerous litigations representing the National Basketball Association, the National Hockey League, and Major League Soccer. He was also Co-Chair of the Proskauer Litigation Department and served three terms on the firm's Executive Committee. Long active in the public sector, Michael presently serves as a member of the Boards of Citizen's Union and Sanctuary for Families, and the Advisory Board of Legal Outreach. He previously served as president of the 22,000-member New York City Bar Association, chair of both the Fund for Modern Courts and the Columbia Law School Board of Visitors and head of two court system task forces. He is an appointee of the Chief Judge.

Justice Randall T. Eng (Ret.) is Of Counsel to Meyer, Suozzi, English & Klein, P.C., and a member of the Litigation Department, including the Appellate Practice and Criminal Defense groups. Immediately prior to joining Meyer Suozzi, Justice Eng served as the Presiding Justice of the Appellate Division, Second Department from 2012 - 2017. Born in Guangzhou, China, Justice Eng was raised in New York City. He earned his undergraduate degree from State University of New York at Buffalo and his juris doctor degree from St. John's University School of Law in 1972. Following law school, Justice Eng began his legal career in public service as an assistant district attorney in Queens County. At the time, he became the first Asian American appointed as an assistant prosecutor in New York State history, and then served as the Deputy Inspector General of the New York City Correction Department and later Inspector General. In 1983, Justice Eng became the first Asian American to become a judge in New York State, when he was appointed to the Criminal Court of the City of New York. In 1990 and 2004, Justice Eng was elected and reelected to terms on the New York State Supreme Court. In 2008 he was designated as an associate justice of the Appellate Division, Second Department. Justice Eng served as President of the Association of Supreme Court Justices of the City of New York and as a member of the Advisory Committee on Judicial Ethics. He is currently a member of the New York State Judicial Institute on Professionalism

in the Law. He has also served as an adjunct professor at St. John's University School of Law. Justice Eng proudly served his country as a member of the New York Army National Guard and retired as State Judge Advocate holding the rank of Colonel. He is an appointee of the Chief Judge.

Mitra Hormozi served as Executive Vice President and General Counsel for Revlon, Inc., from April 2015 to July 2019, responsible for overseeing the Company's worldwide legal affairs. Ms. Hormozi also acted as the Company's Interim Chief Human Resources Officer from October 2018 to February 2019. Prior to joining Revlon, Ms. Hormozi was a partner at Zuckerman Spaeder and Kirkland and Ellis, respectively. Previously, Ms. Hormozi served as Deputy Chief of Staff to then New York State Attorney General, Andrew Cuomo. Ms. Hormozi also served as an Assistant United States Attorney for the Eastern District of New York, where she became Chief of the Organized Crime and Racketeering section. Since December 2018, Ms. Hormozi has served as a director of Athene Holding Ltd. which is a NYSE-listed company that offers and reinsures retirement savings products. Ms. Hormozi is also a consultant for Revlon, Inc. With her background, Ms. Hormozi has extensive experience in both the public and private sectors of the legal field, as well as senior executive and business experience. Ms. Hormozi also currently sits on the Board of New York University School of Law's Program on Corporate Compliance and Enforcement. Ms. Hormozi received a Bachelor of Arts in history from the University of Michigan and a Juris Doctor from New York University School of Law. She is an appointee of the Governor.

Seymour Lachman is the Dean Emeritus of the Hugh L. Carey Institute for Government Reform at Wagner College, where he is also a Distinguished University Professor Emeritus of Government. Prior to his election to the New York State Senate in 1996, where he served for five terms representing a diverse district that included parts of Brooklyn and Staten Island, Dean Lachman's professional efforts were concentrated in the fields of education, government, and university administration. At the time of his election, he served as University Dean at the City University of New York and Professor of Educational Administration and Government at the Baruch College School of Public Administration. While teaching at the City University, Dean Lachman was selected to serve on the New York City Board of Education. He was subsequently elected President of the Board, and his significant policy accomplishments included restructuring the Board of Education; codifying rights and responsibilities of high school students; establishing confidentiality of student records; creating high school consultative councils of administrators, faculty, parents, and students; and creating an appeals process for the central Board of Education. He is the author of several books focusing on

government, including: *Three Men in a Room: The Inside Story of Power and Betrayal in an American Statehouse*; *The Man Who Saved New York: Hugh Carey and the Great Fiscal Crisis of 1975* (co-authored with Robert Polner); *Mr. New York: Lew Rudin and His Love of the City*; and *Failed State: Dysfunction and Corruption in an American State House*. He is an appointee of the Temporary President and Majority Leader of the New York State Senate.

Peter Madonia serves as the Chairman of the Belmont Business Improvement District (BID), whose mission is to promote and expand the economic wellbeing of the business community and the community at large, by promoting the “Little Italy in the Bronx” brand, their strong ethnic heritage and leadership in the culinary marketplace. In addition to the Belmont BID, Peter has a legacy of public service. For the past 17 years, Peter spent 12 years as the Chief Operating Officer of the Rockefeller Foundation and helped that institution celebrate its Centennial in 2013. As COO, he provided leadership and strategic direction for financial and operational functions, overseeing various areas including human and financial resources, information technology, facilities and office services, records management and library services. He also managed the Foundation’s regional office operations in Nairobi, Kenya; Bangkok, Thailand; and the Rockefeller Foundation Bellagio Center in Bellagio, Italy. Prior to the Rockefeller Foundation, Peter was Chief of Staff to Mayor Michael Bloomberg from 2002-2006, when he was responsible for overseeing day-to-day operations and a position he was appointed to after serving as senior advisor to the Bloomberg for Mayor campaign. Peter’s previous experience in New York City government included serving as first deputy commissioner of the Fire Department, deputy commission for budget and operations at the Department of Buildings, and chief of staff to the deputy mayor for operations. Peter received a bachelor’s degree from Fordham University, where he has taught urban studies as an adjunct professor. He also has a master’s degree in Urban Studies from the University of Chicago. He is an appointee of the Speaker of the New York State Assembly.

Jim Malatras is the 5th president of SUNY Empire State College, a college with more than 30 locations in New York and internationally. SUNY Empire State offers online or face to face education, or a combination of both. Prior to joining SUNY Empire, he served as president of the Rockefeller Institute of Government, offering policymakers evidence-based policy analysis and recommendations on timely topics. Dr. Malatras currently serves as the Chair of the Board of Advisors for the Rockefeller Institute. Dr. Malatras has held several high-ranking positions in New York State government, including as director of state operations and deputy

secretary for policy management to Governor Andrew M. Cuomo. He is an appointee of the Governor.

Robert Megna was appointed Senior Vice Chancellor and Chief Operating Officer of SUNY System Administration November 2017. In this role, he oversees the operations of Chief Information Officer, the State University of New York (SUNY) Plaza business functions, capital facilities, campus energy management, and the Charter School Institute. He joined SUNY System Administration from Stony Brook University where he served as Senior Vice President for Finance and Administration. Prior to joining Stony Brook, he served as Executive Director of the NYS Thruway Authority and NYS Canal Corporation. Bob served as Budget Director for NYS Division of the Budget, during which time the state achieved its highest financial rating in 40 years from three major credit rating agencies and passed four on-time budgets for the first time since the 1970s. He also chaired multiple governmental boards including the Financial Restructuring Board, the New York Racing Association, and the Public Authorities Control Board. Mr. Megna has also served as Commissioner for NYS Taxation and Finance, Director of the Revenue and Economics Unit at the NYS Division of Budget, Assistant Commissioner of the Office of Tax Policy at the Virginia Department of Taxation, Director of Tax Studies at the NYS Department of Taxation and Finance, and Deputy Director of Fiscal Studies on the Assembly Ways and Means Committee. Mr. Megna earned an M.S. in Economics from the London School of Economic and Political Science at the University of London, and received both his B.A. in Economics and M.P.A. from Fordham University. He is an appointee of the Governor.

INTRODUCTION

Part E of chapter 60 of the Laws of 2015 provides that every fourth year commencing in June 2015 a commission shall be established “to examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits” for judges, members of the Legislature, and certain Statewide elected officials and Executive Branch officers named in Executive Law § 169. The Commission is charged, first, with issuing, by December 31, 2019, “findings, conclusions, determinations and recommendations” to the Governor, the Legislature

and the Chief Judge with regard to judicial compensation. Chapter 60 sets forth a number of factors to guide the Commission’s work in determining appropriate judicial salary levels, including, but not limited to: “the overall economic climate in New York; rates of inflation; changes in public-sector spending; 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.”¹ Chapter 60 provides that the Commission shall consist of seven members appointed by the leaders of the three branches of New York State government. Three members are appointed by the Governor; two (including the Chair) by the Chief Judge; and one each by the Temporary President of the Senate and the Speaker of the Assembly. This statute was amended in 2019,² which changed the voting procedure with regards to judicial compensation to require any recommendation to be adopted by at least one Commissioner appointed by each appointing authority.³

In accordance with its statutory mission, the Commission held public meetings in New York City on October 17, November 21, November 26, and December 18. It also held a public hearing in New York City on November 4, at

¹ Chapter 60 of the Laws of 2015 Part E.

² Chapter 59 of the Laws of 2019.

³ This procedure is the same as the practice for voting on legislative and executive salaries that has existed since the Commission’s inception in 2015.

which witnesses for 10 organizations testified, and a public hearing in Albany on November 14 at which 4 organizations testified. The six public hearings and meetings were televised live on the Internet. In addition, the Commission invited written commentary and established post office and email addresses (nyscompensation@gmail.com) through which it received 19 written submissions from judicial associations, bar associations, corporate and business groups, good government groups, institutional litigants and other interested individuals and organizations. The written and oral submissions, totaling many hundreds of pages, contributed greatly to the Commission members' independent research. The witness lists, written submissions, and other information about the work of the Commission, including transcripts and videos of the Commission's public hearings and meetings, are all available on its website at:

<http://nyscommissiononcompensation.org/>.

As stated in further detail below, while a majority of Commissioners voted in favor of granting limited COLAs to New York State Judges in three of the next four years, this majority vote did not include support by a member of each appointing body and therefore cannot take effect. Specifically, because Commissioner Madonia, an appointee of the Speaker of the New York State Assembly Carl Heastie, and Commissioner Lachman, an appointee of the Temporary President and Majority Leader of the New York State Senate Andrea

Stewart-Cousins, voted against the proposed COLAs, the statute does not allow for them to go into effect. Accordingly, under the governing statute the Commission will not recommend any salary adjustments for New York State judges in the next four years.

**STATEMENT OF THE CONTROLLING VOTE OF COMMISSIONERS
MEGNA, MADONIA AND LACHMAN**

The Division of the Budget released the midyear Financial Report in November. This report detailed a significant gap between the receipts and spending in excess of \$6 billion in the current fiscal year. This represents a significant deterioration in state finances that is projected by the Division to persist into future fiscal years. Unfortunately, at this juncture before release of the Executive Budget and the actions taken by the Legislature on the proposed plan, we do not possess knowledge of the actions required to improve this projected deficit. This by definition suggests any action to raise judicial salaries would be imprudent at this juncture.

It is difficult in tough fiscal times to make long term decisions on compensation, however, the Commission rules require that we set a framework for the next 4 years. Certainly, the judiciary in this state contributes enormously to all of our benefit. We also recognize the heavy workload our judges take on at all levels. Unfortunately, challenging fiscal times require thoughtful approaches to multi-year commitments when spending scarce tax dollars. At this time, it would

not be in accordance with good fiscal practice to establish any multi-year pattern of salary increases for the judiciary. This is especially true given that we do not yet know the actions the Governor and Legislature will take to solve the fiscal imbalance facing the state. Further, it seems intemperate at best to make any salary decision now when after solving the shortfalls facing the State in the 2020-21 budget, the Legislature and Governor can address the salary issue directly if they find it appropriate. It should be pointed out that when the state faced similar fiscal shortfalls in the past there were significant periods where the salaries of many public employees were held flat for multiple years. In other cases Management Confidential employees at the state level went multiple years with no raises and in some limited cases actual reductions. It should also be noted that New York State judges are currently the highest paid in the nation and have seen over a 50 percent increase in salaries since the Commission model was adopted. Given these factors, it seems hard to argue there are any past salary inequities that need to be addressed now in tough fiscal times.

There has been some discussion that the Office of Court Administration (OCA) would absorb any salary increase proposed by the Task Force. While we certainly understand OCA's position on absorbing raises, we find it difficult to justify future financial commitments absent an understanding of financial decisions

yet to be made in the Executive Budget that could adversely impact OCA along with other state agencies.

In addition, there has been a discussion of compromise proposals that would deviate from the current methodology of tying judicial salaries of New York judges to that of federal judges. Again, without knowing the extent of the fiscal problems facing the state or proposed solutions, this approach seems not only imprudent but too ad hoc. Should the Governor and Legislature solve the fiscal problems they now face, they may choose to reconstitute a Task Force to address judicial compensation in the future. In that case, a new multi-year methodology may be designed that would benefit judges more significantly than the compromises now discussed.

There is significant consternation among some members of the Commission that a failure to raise salaries now and to lock these actions in for the next four years will result in a potential long delay before judicial salaries will be addressed. The more than a decade that judges went without an increase before the current Commission structure is often cited by those in favor of an increase. Again, as already mentioned the Legislature can chose to remedy this situation almost immediately by taking up judicial salaries directly. Alternatively, the Governor and Legislature can choose to reconstitute this Commission to address judicial salaries in the New Year once the fiscal shortfalls they face have been addressed.

Given the salary progress judges have made, the sense of urgency maintained by some members of the Commission seems unwarranted.

It should be noted that not all commission members agree that judicial salaries should be linked to federal judges. The difference between elected state judges and appointed federal judges requires comparisons of non-like positions.

**DISSENTING STATEMENT OF COMMISSIONERS CARDOZO AND
ENG**

Three of the seven members of the statutorily created New York State Commission on Legislative, Judicial and Executive Compensation have voted not to increase the salaries of New York State judges for the next four years. We strongly dissent.

While mandated by law to determine, by the end of 2019, whether to recommend that New York judges should receive a salary adjustment for the next four years, the three commissioners voting against a salary increase will not recommend that the approximately 1300 New York State judges should receive even a single cost of living increase (“COLA”) through the end of 2023, an increase that is estimated to amount to less than \$3.5 million each year, or .115% of the judiciary budget of \$2.4 billion. And the controlling vote, apparently relying on a projected Medicaid gap in State funding for the coming year, voted against any increase during this four year period despite the promise of the Office of Court Administration (hereinafter “OCA”) that such an increase could be absorbed

by the judiciary within its budget, just as OCA has done for the last seven years when salary increases were much larger.

According to the controlling vote, the uncertainty of the State's fiscal situation justifies those commissioners in refusing to recommend an adjustment – even for COLAs – to judicial salaries for the next four years. Instead, they argue, that decision should be made by the Legislature, despite the statute's mandate that it is for the Commission to recommend such adjustments, with the Legislature having the power to overrule that decision before it takes effect.

The controlling vote reached this conclusion even when it was suggested by the Dissenters that the alleged fiscal uncertainty could be met by (i) providing no salary adjustments in the first year; or ii) limiting increases in later years to COLAs that in no event could exceed 2%, or iii) giving a COLA increase only in 2020. Each of those proposed compromises were rejected.

At a time when very recent New York State government salary increases have averaged 2% per year, this refusal to simply provide for a COLA, which is projected to be substantially less than 2% and which would have been limited to 2% in any given year, is unsupported by fairness, history or logic. And the determination to

deny judicial raises, to the extent it is based on conditioning a future salary increase to an agreed salary increase for legislators may well be unconstitutional.⁴

I. Background

There can be no dispute that a highly qualified judiciary is essential in order for New York to ensure that every citizen has access to a fair tribunal to adjudicate civil and criminal proceedings - ranging from cases with enormous economic implications to child custody disputes to charges of serious crimes - and further so that New York can remain one of the world's most important commercial capitals. This extraordinarily important task must be dealt with by judges in one of the most complex and busiest court systems in this country. In 2018, the last full year for which comprehensive data is available, New York State courts were tasked with handling nearly three times the number of filings dealt with by the entire Federal Judiciary.⁵ To sustain and enhance the judiciary in the face of this demanding and vitally important workload New York must ensure that it can attract and retain motivated and talented individuals to the bench, and be able to assure them their salaries will keep pace as the cost of living rises.

⁴ See *Maron v. Silver*, 14 N.Y.3d 230, 259, 263 (N.Y. 2010) (Judicial compensation determinations “cannot depend on ... legislative compensation adjustments” as they must be “addressed on the merits” and not held “hostage to other legislative objectives.”).

⁵ See Submission of the Chief Administrative Judge to the 2019 Commission on Legislative, Judicial and Executive Compensation (hereinafter “OCA Submission”), at 18.

Notwithstanding the importance of offering judges fair and adequate compensation, during the last 20 years New York has frequently failed to offer salary increases to the judiciary, resulting in significant salary compression. Between 1999 and 2012 no judicial salary increases at all were given in New York, resulting in many non-judicial employees receiving salaries approaching and sometimes eclipsing, those of the judges for whom they worked. It has been estimated that during that time a sitting judge lost \$350,000 as a consequence of inflation.⁶

It was to address this problem and to accomplish the important task of providing the judiciary with adequate compensation, including cost of living increase protections, that a judicial compensation commission, later expanded to also include legislative and executive compensation, was first created in August of 2011.⁷ The 2011 Commission recommended, as did the subsequent 2015 Commission, that state Supreme Court Justice salaries should, following a phase-in period, be the same as that of the salary of a Federal District Court judge. Under federal law salaries of Federal judges are subject to an automatic cost of living increase every year.

⁶ See OCA Submission, at 10.

⁷ Chapter 567 of the Laws of 2011.

The 2015 Commission⁸ recommended that Supreme Court Justices be paid the same as Federal District Judges by 2019, the last year in which the 2015 recommendations were in effect, and that parity was achieved at the beginning of this year.

The present Commission is charged with the duty to “determine [by the end of 2019] whether salaries of state judges should be adjusted”⁹ (the Commission is also charged with making legislative and executive recommendations next year). The judicial compensation recommendations are to cover judge’s salaries for 2020, 2021, 2022 and 2023 and have the force of law unless the Legislature, by April 1 of the year for which the recommendations are to go into effect, modifies or abrogates them.

II. The Controlling Vote’s Arguments

The controlling voters offer three reasons for their decision: (1) that the State may not be able to afford the salary increase, (2) that recommendations reaching four years into the future are best left to the Legislature given the State’s uncertain economic future, and (3) that using a federal judge’s salary as the salary benchmark is inappropriate. We believe each of these objections are incorrect and in any event do not justify a complete four year denial of COLAs.

⁸ See Final 2015 Report of the Commission on Legislative, Judicial and Executive Compensation.

⁹ Chapter 59 of the Laws of 2019, Part VVV.

i) New York Can Afford the Cost of Living Increase

The controlling vote of Commission members point to the projected Medicaid spending gap in the coming year as a reason for a four year denial of COLAs. Certainly the State's fiscal condition must be taken into account in setting judicial salaries and the governing statute so requires. But we do not believe that this year's fiscal uncertainty justifies a complete denial of COLAs to judges for the next four years.

On October 17, 2019 the Division of the Budget published its Annual Information Statement Update, which constitutes the official disclosure regarding the financial position of the State. The update represents that the State's finances are relatively healthy: the budget will continue to allow for annual increases in State Operating Funds of up to 2%, the State ended June 2019 with a General Fund balance \$1.3 billion above the estimate in the Enacted Budget Financial Plan, and the state was recently able to afford 2% general salary increases for a host of state employees.¹⁰ In addition, since the release of that report the Metropolitan Transportation Authority (the MTA), an entity controlled by the State, announced it had agreed to a 9.8% salary increase for workers over the next four years.¹¹

¹⁰ Annual Information State Update, October 17, 2019, (hereinafter "Annual Information State Update"), at 15-16.

¹¹ The salary increase is expected to cost \$830M over the next four years. Clayton Guse, *Worker behavior will have to change for cash-strapped MTA to afford \$830M in wage hikes over next four years*, NEW YORK DAILY NEWS, Dec. 7, 2019, available at

The Information Statement Update does state that despite its generally positive financial outlook, the Division of the Budget estimates that State Medicaid spending could exceed the Global Cap by a range of \$3-4 billion in FY 2020.¹² Such a gap could have a materially adverse impact on the State's ability to limit annual State Operating Funds spending growth to 2% in FY 2020 and FY 2021 as has been state practice. While the Division of the Budget noted that it is expected that, to the extent practicable, management actions will be taken to avoid piercing the Global Cap, these actions are as of yet unknown. Accordingly, the update does not reflect the estimated imbalance in the Global Cap or the actions expected to be taken to address it.

The judicial salary increases that the controlling vote has rejected would be limited to COLAs over a four (or even three) year period and in any event are exceedingly small, both in actual dollars and in the percentage of the OCA budget they represent. They appear to be easily afforded by this State. As reported by the Chief Administrative Judge, in the past four years since the previous commission recommended linking state salaries with Federal District Court Judges, COLAs for state judges have averaged just 1.28% per year. For context, a 1% increase in

<https://www.nydailynews.com/new-york/nyc-crime/ny-mta-worker-wage-hikes-money-breakdown-20191207-bo3k5x4tubcmtgoxtizpstk4e-story.html>.

¹² Annual Information State Update, at 42.

judicial salaries would constitute only .115% of the Judiciary's annual budget and cost only \$2.7 million.¹³ The judiciary has wide latitude over its budget, and assured the Commission that it would easily be able to pay for the proposed COLAs.

The Judiciary's history of consistently absorbing the cost of judicial pay increases - as it has done every year since the inception of the commission system in 2011 - suggests that the State can easily afford the Commission's recommendations. Specifically, the Judiciary has absorbed: a 17% pay increase for the 2012-2013 fiscal year, a 4.3% increase for the 2013-2014 fiscal year, a 4.2% increase for the 2014-2015 fiscal year, and a 6.7% increase this past fiscal year.¹⁴ Finally, should the State face a drastic and unforeseen budget crisis, the Legislature retains full authority under the Commission's enabling statute to abrogate any of the Commission's pay recommendations up until the moment they are scheduled to take place in the relevant fiscal year.

Moreover, to meet the controlling vote's concern that the State might not be able to afford the COLA increase this year, we proposed two additional protections. First, a one year delay in awarding such an increase so that there would be no increase for 2020. Second, to protect against an unforeseen increase in future years we had suggested that no COLA salary increase could be greater than 2% in any

¹³ OCA Submission, at 20-21.

¹⁴ Supplemental OCA Submission, at 2.

given year. This would ensure that the increases will be implemented in a way that is responsible in light of any future budgetary concerns that may afflict the State.

This would mean for the coming year the State would be saving money and would not be committing further funds to salaries when facing a potentially significant shortfall in its Medicaid Global Cap. These savings are particularly valuable where, as here, there are questions regarding the short term financial health of the State. Moreover, under the law the Legislature already has the safety valve to undo the recommendations of the Commission before they are to take effect in a given year.

Second, delaying the granting of COLAs by a year, before restarting them in 2021 with a 2% cap, will allow the Legislature ample time to review the changes to federal judicial salaries and this State's financial condition and further ensure that even if the Legislature failed to act state compensation would not accidentally reach an untenable threshold as it could only increase by 2% in any given year (a presumptively reasonable amount given the host of other state employees currently receiving yearly 2% raises from the State). There will therefore be sufficient time for the Legislature, upon reviewing the State's finances, to revise or rescind these future increases if it feels it is necessary to do so before they take effect and further there will be no downside if they do not.

ii) The State's Uncertain Economic Outlook Does Not Justify The Commission Abdicating its Statutory Responsibility

The controlling vote commissioners argue that if there is a difficult decision regarding paying judicial salaries, the appropriate course of action is for the Legislature to make that difficult decision. We find this assertion deeply illogical. This Commission was created by the Legislature specifically to decide the appropriate level of judicial compensation for the next four years. Now, the controlling vote has decided that the Commission cannot set salaries for four years, because the only people who can appropriately do so in uncertain economic times are the Legislature. This, despite the fact that the Legislature created this Commission specifically to make such forward looking recommendations. Deciding that the proper course of action is nevertheless to send this issue back to the Legislature does not comply with - indeed it violates - the Legislature's intent in creating this Commission.¹⁵

However, not only does punting this issue back to the Legislature directly contradict the reason for this Commission's creation in the first place, the authors of this Dissent do not believe the State's financial future to be so murky as to

¹⁵ The controlling vote reasons that it is in fact respecting Legislative intent because the Legislature asked for recommendations on salary, and it has recommended no salary increases. This is deeply illogical. The controlling vote bases its decision in large part on the fact that the Legislature can, and indeed should, deal with this issue. The Legislature's inability to do so in the past is why this Commission exists in the first place, and this justification simply makes no sense.

necessitate the drastic step of freezing judicial salaries, regardless of which body does so.

First, as noted above, the State has recently approved a host of raises for state employees that would far exceed the COLAs proposed by the Dissent. The controlling vote counters that not all labor agreements are the same and that those raises were the product of labor negotiations that are different than setting salaries for high level non-union personnel. But how can the State afford \$830 million for MTA employees, but cannot even begin to countenance the proposed \$9 million over four years for judges? If the problem is the length of commitments for salary increases, why did the State agree to grant a *four* year raise to MTA and other employees, but the Commission cannot even propose a *three* year COLA for judges? Moreover, how is it that the State is in such economic distress that it cannot come up with the money to pay judges COLAs starting in 2021, but can pay MTA employees a generous raise right now?

Additionally, not only was the Commission created for the very purpose of making recommendations for the State in times of financial uncertainty, but it has in fact *only* operated in times when New York's finances were not optimally healthy. When the Commission, in 2011, first recommended that State Supreme Court Salaries achieve parity with the Federal District Courts, it did so despite the fact that at the time New York “[had] and [continued] to face multi-billion dollar

budget gaps, with a projected deficit of \$2.5 billion [in 2012].”¹⁶ In that year, rather than take the drastic step of enacting a total freeze on judicial salaries, the Commission made the reasoned decision to phase in judicial salary increases over several years. Such a compromise, similar types of which the controlling voters here have flatly rejected, allowed the Commission both to provide judges with much needed raises (raises that far outpaced the modest COLAs the Dissent has recommended) and at the same time respect the precarious state of New York’s finances. Yet for some reason now, when the State is in much healthier financial shape than 2011, limited COLAs are simply out of the question.

iii) The Federal District Judge’s Salary is the Correct Benchmark for a State Supreme Court Justice’s Salary and in any event the Controlling Vote Has Not Suggested an Alternative

The other reason sometimes offered by the members of the controlling vote for its denial of a salary adjustment is that pairing state court salaries to those of federal judges is the wrong standard. Not only is this incorrect but the controlling vote offers no alternative benchmark on which to base the judge’s salaries.

Using Federal District Court salaries as a guidepost for New York Supreme Court Justice salaries is well supported by historical precedent. The last time the Legislature itself adjusted judicial compensation, in 1999, it set the salary of a State

¹⁶ See Final Report of the 2011 Special Commission on Judicial Compensation, at 7.

Supreme Court Justice at exactly that of a Federal District Court Judge at that time.¹⁷ At other times, including in 1978 and for the period between 1985-1990, some Supreme Court Justices actually enjoyed higher salaries than Federal District Court Judges.¹⁸ And as noted above, both the 2011 and 2015 Commissions concluded that a Federal District Court salary was the right benchmark to use in setting Supreme Court Justices' salaries. Simply put, tying state judicial salaries to the Federal District Courts in some fashion has routinely been the practice of New York State and some other states as well.¹⁹

Some members of the controlling vote apparently view the Federal District Court salary as overly generous. Yet setting a Supreme Court Justice's salary close to the level of a Federal District Judge is clearly consistent with, and in many instances lower, than the pay of judges throughout the nation. When adjusted for cost of living the salary of New York's judges ranks only in the middle of the country and behind that of other large commercial states. The cost of living adjusted salary of a New York Supreme Court Justice in 2019 (\$143,583) continues to trail other large and comparable states such as Illinois (\$183,658), Pennsylvania (\$171,061), and Florida (\$154,135).²⁰

¹⁷ Final 2015 Report, at 5.

¹⁸ *Id.* at 10.

¹⁹ See OCA Submission on Comparable State Judicial Salaries.

²⁰ OCA Submission, at 17-18.

Moreover, the Commission received substantial submissions to the effect that most New York judges come to the bench after practicing for a decade or more, and most take significant pay cuts in order to serve the public. And while New York Supreme Court Justices currently enjoy the highest nominal salary in the country for state court judges (\$210,900), this salary is only slightly higher than the salaries enjoyed by the states that currently rank second and third in judicial compensation: California (\$207,424) and Illinois (\$207,291) respectively. And many states' salaries that are below New York's in nominal terms are substantially higher than New York's when adjusted for the cost of living.

Finally, even if federal salaries are not the appropriate benchmark on which to base state judges' salaries, what is? The controlling vote has not answered that question.

III. Conclusion of Dissenting Commissioners Cardozo and Eng

The Commission was once a shining light that brought much needed structure and sensibility to the historically fraught issue of judicial compensation. That is no longer true. We are deeply concerned that judicial salaries have once again become pawns in larger political machinations around New York. Not only is this unfair, it may be unconstitutional.²¹ Every statutory factor provided by the Legislature, and well established New York precedent, counsels in favor of these

²¹ See note 1, *supra*, citing *Maron v. Silver*, 14 N.Y.3d 230, 259, 263 (N.Y. 2010).

exceedingly modest and entirely reasonable COLAs for some of New York's hardest working and most important employees. Sadly, the controlling vote thinks otherwise.

While the Commission should have granted a COLA increase to judges its time to do so has expired. We urge the Legislature to promptly correct the situation and grant the COLA increases to New York Judges.

**CONCURRING OPINION TO THE DISSENT OF COMMISSIONERS
MALATRAS AND HORMOZI**

As required under the part E of chapter 60 of the Laws of 2015, amended by part VVV of chapter 59 of the laws of 2019 this Commission has undertaken a comprehensive review of judicial compensation. The law requires this Commission consider and set the level of judicial compensation for the next four years.

During this process the Commission was faced with an important new fact toward the end of our deliberations: a growing state budget deficit. According to the recent financial report from the New York State Division of the Budget, the state is facing a more than \$6 billion budget deficit.²² Commissioner Megna, the state's former budget director, impressively articulated the current fiscal situation in his opinion.

²² New York State Division of Budget, FY 2020 Mid-Year Update
<https://www.budget.ny.gov/pubs/archive/fy20/enac/fy20fp-en-myu.pdf>.

On December 16, 2019, Commission Chairman Cardozo presented a plan after many on the Commission voiced concerns about the state's fiscal condition. The plan included no judicial salary increase in 2020 followed by linking state judges' increases to the annual salary increases of federal judges in 2021, 2022, and 2023, provided however, that in no event will judicial salaries in any year be increased more than 2% from the prior year.

We join Commissioners Cardozo and Eng in support of this proposal, but we do not agree with their reasoning or some of their general characterizations in their dissent. We describe our reasoning in more detail below.

First, while we applaud the Office of Court Administration's intent of using existing state funding for the Judiciary to pay for their recommended increases, given the fiscal uncertainty the Commission cannot verify that is the case. Thus, this Commission cannot make an informed decision whether such cost-neutrality by the Judiciary will be able to be achieved. Therefore, we are comfortable with the Chairman's position of no judicial increase next year because it gives time for the state to address the fiscal situation before moving forward.

Second, Commissioners Cardozo and Eng have criticized other members for not presenting an alternative to benchmarking state judicial compensation to the

federal schedule. Previous judicial commissions have been split on this question²³ and research shows that many states do it differently. For instance, staff research done for the Commission illustrates that states vary in how they set compensation— from Montana, which bases increases on the regional judicial salaries of surrounding states to New Mexico, which bases it on a percentage of the salary of the state’s chief judge. Therefore, we agree with the Chairman’s approach to *cap* annual increases to no more than 2% because 2% is the current pattern used in the contracts for the state’s major collective bargaining units.²⁴ We believe aligning to state contracts could be a more prudent practice for judicial compensation in the future. In fact, Alaska and Indiana set judicial compensation this way.

Third, we respectfully disagree with our colleagues Cardozo and Eng that this alternative is fundamentally unfair because of other recent contract agreements, namely the Metropolitan Transit Authority. As Commissioners Megna, Madonia, and Lachman stated in their opinion, during the time when judicial compensation was annually increasing, other state employees were held

²³ The 2015 Commission was split 4-3. In part, the dissent rejected the link to the federal system stating, “In addition, simply tying State judicial salaries to federal judicial salaries fails to recognize the salaries of other state employees in all three branches, by collective bargaining or otherwise...Such benchmarking effectively defers the Commission’s statutory duty to recommend State judicial salaries to a remote federal process and adds an unnecessary element of uncertainty to budgeting each year.” See Final 2015 Report, at 16.

²⁴ See CSEA Ratifies 5-Year Contract, *State of Politics*, <https://www.nystateofpolitics.com/2017/08/csea-ratifies-5-year-contract/>.

flat because of the state's fiscal situation. For instance, while judicial salaries were increasing, the state's two largest employee unions, CSEA and PEF, were held flat for several years. This is not to pit groups against one another. On the contrary; it is simply to highlight that every situation is different.

Finally, we believe each commissioner wants a strong and independent judiciary, yet there are legitimate policy disagreements. While we side with Commissioners Cardozo and Eng's recommendation, we do not believe there will be harm from the controlling vote's position of taking a pause and giving a chance for the state to reassess the financial condition. Since 2011, judicial compensation in New York State has increased more than 50 percent. Today, as the Office of Court Administration report to this Commission showed, New York now has the highest paid state judiciary in the nation.²⁵ Even when adjusted for cost of living, OCA found that judicial salaries in New York still exceed other states, including California.

We respect the positions of all the commissioners who served with distinction and best grappled with how to proceed given the constraints of the statute governing this Commission, as well as the fiscal condition of the State. We, like every other commissioner, strongly agree that New York needs to continue to attract well-qualified lawyers into the judiciary and that the judiciary maintain its

²⁵ OCA Submission, at 17.

important role as a separate and equal branch of government. But we must balance many issues when making our final determination.

For these reasons, we join Commissioners Cardozo and Eng in supporting their proposal of freezing judicial compensation next year, and limiting increases to no more than 2% annually over the next three years thereafter. We believe this proposal strikes the right balance. However, we would like to amplify Commissioners Megna, Madonia, and Lachman's position of welcoming the Legislature reconsider or authorize this Commission reconsider judicial compensation next year after the state's fiscal situation becomes clearer.

CONCLUSION

While four of the seven members of this Commission have voted to grant COLAs to New York State judges, the Commission's enabling statute requires that a majority vote be supported by one member from each appointing body. Because neither the appointee of the Speaker of the New York State Assembly nor the appointee of the President Pro Tempore of the New York State Senate, voted in favor of the COLAs the Commission does not have a majority recommendation that may carry the force of law. Therefore, the Commission makes no recommendation that judicial compensation be adjusted in the next four years.

DATED:
New York, New York
December 26, 2019