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Supreme Court of the State of New York

APPELLATE DIVISION—FIRST DEPARTMENT

HON. SUSAN LARABEE, HON. MICHAEL NENNO,
HON. PATRICIA NUNEZ and HON. GEOFFREY WRIGHT,

Plaintiffs-Respondents-Cross Appellants,

—against—

GOVERNOR OF THE STATE OF NEW YORK,

Defendant-Respondent-Cross-Respondent,

NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY,
and STATE OF NEW YORK,

Defendants-Appellants-Cross-Respondents.

BRIEF FOR *AMICI CURIAE* CHIEF JUDGE JUDITH S. KAYE AND THE NEW YORK STATE UNIFIED COURT SYSTEM

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Introduction and Statement of Interest of *Amici Curiae*

Also on the docket in Supreme Court, New York County, before Justice Lehner, is a second case challenging defendants' failure to adjust judicial compensation. That case, *Kaye* v. *Silver*, Index No. 400763/08, was brought by the *amici curiae* here, the Chief Judge of the State of New York in her official capacity, and the New York State Unified Court System as a whole. Defendants here have made dispositive motions in *Kaye*. The motions were argued on July 17, 2008 and remain pending.

The case now before this Court seeks relief for four individual judges; *Kaye* seeks relief for the Judiciary as a whole, as a coequal branch of the government of this State. Only one of the three causes of action asserted in *Kaye* is presented here. That is the third cause of action in *Kaye*, a separation-of-powers "linkage" claim. Whatever the Court decides on linkage disposes of that claim in *Kaye*.

The first two claims brought in *Kaye* were not presented or addressed in the case now before this Court. But defendants' expansive contentions on this appeal clearly implicate these claims, and these claims may well be affected by holdings that this Court may reach here. Moreover, given the importance of the issues presented in *Kaye* and in this case, the public interest would be served by the Court's consideration of all issues at the same time. It is for that reason that the Chief Judge and the Judiciary respectfully submit this *amicus curiae* brief.

Specifically, the first cause of action in *Kaye* is that judicial salaries in New York have become inadequate, so inadequate as to violate the independence of the Judiciary and the separation of powers guaranteed by the State Constitution.

The second cause of action that the Chief Judge and the Judiciary present, but that was also not raised in *Larabee*, lies under the Compensation Clause of the State Constitution, Article VI, Section 25. The plaintiffs in *Larabee* did assert, and Justice Lehner did dismiss, a Compensation Clause claim, but the claim was different. The *Larabee* plaintiffs asserted that defendants' failure to adjust judicial salaries in the face of inflation, by itself, violated Article VI, Section 25. What the Chief Judge and the Judiciary allege in *Kaye*—and what is factually not disputed and, indeed, is beyond dispute—is not only that defendants failed to adjust judicial salaries, but that they also *discriminated* against judges by giving raises to *virtually everyone else* employed by the State of New York.

Again, neither of these claims was presented in *Larabee*. Nonetheless, if the Court were to accept the arguments made by defendants here, those claims would be precluded. For defendants claim that "*nothing* in the New York State Constitution required the Legislature or Governor to propose, adopt or approve an increase in judicial compensation, either to offset the effects of inflation or for any other reason." Defendants' Opening Brief on Appeal ("Def. Br.") 4-5. They argue that the Constitution provides *no* "substantive guarantee of any particular level of judicial compensation, let alone a constitutional guarantee of 'adequate' compensation." *Id.* at 4. That should be "the end of this case," defendants say. *Id.* at 5.

Defendants are wrong. First, as we show below, and as we are seeking to show in *Kaye* v. *Silver*, the State Constitution *does*—by creating three coordinate, coequal, independent branches of government with separate powers—guarantee an adequate level of judicial compensation. Defendants actually *conceded* this point in this case in open court below. "*Yes*," an Assistant Attorney General unequivocally responded, when Justice Lehner asked whether, "without any proviso," "there is a stage where the salary could be so low that it could be constitutionally objected to." R323 (emphasis added).

And the case law makes clear that the Attorney General's office was right to concede this. The cases clearly establish that the separation of powers requires that judicial pay be adequate. They establish that, to be constitutionally adequate, judicial pay must suffice "to insure the public's right to a competent and independent judiciary," which means it must be enough to allow the judiciary to "maintain its ability to attract and retain the most qualified people." *Goodheart* v. *Casey*, 521 Pa. 316, 323, 555 A.2d 1210, 1213 (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." *Id.* at 322, 555 A.2d at 1212. Assessing the constitutional adequacy of judicial compensation thus requires comparative analysis: a court must look to what judges make elsewhere, to what other lawyers, and other professionals, make in both the private and public sectors, and then decide whether judicial pay is commensurate, given what judges do and what is expected of them. Courts may also look to historical

levels of judicial pay to decide whether pay today is adequate. As the undisputed record in this case and in *Kaye* shows, 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.

Defendants' principal response to this has not been to argue that judicial pay is adequate and should not be raised. That argument is fairly well closed off to them. As the court below stated, "all parties have agreed that the judiciary is entitled to an adjustment," and "all parties have agreed" even on "the amount thereof." R53. Indeed, on behalf of the Assembly, the Senate, and the State of New York, the Attorney General represented to the court below that "no governor or member of the legislature, to my knowledge, has spoken to the contrary." R47 (quoting R613). And in this Court defendants flatly concede that there is *no* "doubt that a judicial pay increase is *well deserved*." Def. Br. 2 (emphasis added).

Instead, the principal argument that defendants make on constitutional adequacy is a historical one. They argue here on appeal, exactly as they argue in *Kaye*, that the current nine-year pay freeze presents no constitutional problem because "there were many periods, much longer than the nine years to which the Trial Court attached constitutional significance, when judicial salaries were unchanged." Def. Br. 50. 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.* at 48. But as we show below, defendants draw the wrong lesson from their history books, because they overlook some rather crucial

facts. To begin with, they overlook how, for many of the years in the periods they cite, there was *no* inflation, and often even *substantial deflation*.

More importantly, though, they overlook the real level of compensation that defendants say was paid to judges during the periods of nominal salary stagnation they describe. 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* for—today.

So defendants' constitutional history proves the opposite of what they claim—it refutes their argument that judicial salaries, by historical standards, are adequate today. But defendants are wrong on other points as well. They are wrong to deny, as they have in this case and in *Kaye*, that there has been any violation of the Compensation Clause. As we show below, their 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, whether purposefully or not, "effectively single[] out . . . judges for unfavorable treatment" in comparison to other government employees. *Id.* at 561.

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 small number of high State officials have also been frozen makes no difference at all.

Beyond this, as we also show below, defendants are wrong when they argue, as they do here and in *Kaye*, that the courts may not constitutionally order a judicial pay adjustment. The Speech or Debate Clause in particular does not preclude relief. That clause only protects legislators and legislative deliberations; it does not preclude claims against non-legislative defendants, such as the State, and certainly it does not preclude the non-"linkage" judicial compensation claims, because those claims do not depend in any way upon motives of legislators.

Nor does the Speech or Debate Clause preclude the "linkage" claim asserted by the Chief Judge and the Judiciary, because it has no application to a separation-of-powers challenge brought by one co-equal branch of government against

another. The clause must always be applied "in such a way as to insure the independence of the legislature without altering the historic balance of the three coequal branches of Government." *United States* v. *Brewster*, 408 U.S. 501, 508 (1972). As a result, in a case of inter-branch conflict, the clause "does not immunize from judicial review a colorable constitutional claim, made in good faith, that the legislature has violated the separation of powers [and thereby] conducted itself outside the sphere of legitimate legislative activity." *Office of the Governor* v. *Select Comm. of Inquiry*, 271 Conn. 540, 559-60, 858 A.2d 709, 722 (2004).

Finally, defendants' invocation of the separation of powers as a defense to their separation-of-powers violations is utterly without merit. Defendants argue that plaintiffs' claims threaten an "intru[sion] into the budget-making or appropriations process reserved to the Governor and Legislature," and that the lower court's order "ended up usurping the separate powers reserved by the Constitution to the Legislature and the Executive, thus defeating the objectives of the separation of powers doctrine." Def. Br. 32, 30. In essence, defendants argue that judicial review itself violates the separation of powers. But judicial review does *not* "by any means suppose a superiority of the judicial to the legislative power." THE FEDERALIST NO. 78 (Hamilton). It presupposes only what none can dispute: that "the constitution is superior to any ordinary act of the legislature." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

In short, all that plaintiffs here and the plaintiffs in *Kaye* ask is for this Court to exercise what "emphatically" has always been "the province and duty of the judicial department"—"to say what the law is." *Id.* at 177.

Argument

POINT I

THE NEW YORK CONSTITUTION REQUIRES THAT JUDICIAL COMPENSATION BE ADEQUATE, AND JUDICIAL COMPENSATION IN THIS STATE IS, IN FACT, INADEQUATE TODAY.

As the court below recognized, the plaintiffs in this case, unlike the Chief Judge and the Judiciary in *Kaye* v. *Silver*, "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." R16 (emphasis added). The issue of constitutional adequacy nonetheless arises on this appeal, because defendants now make it an issue. They seem to argue in this Court that judicial salaries, *no matter how low they may be*, could *never* be constitutionally inadequate, and that, for this reason, both of plaintiffs' claims here should be dismissed.

Specifically, defendants argue that both of plaintiffs' claims here are, in reality, claims that judicial compensation is "too low":

> In essence, Plaintiffs' complaint makes only one substantive claim—that Article 7-B of the Judiciary Law, which sets the compensation of State-paid judges is unconstitutional because that compensation is too low.

And again:

> [T]he essence of Plaintiffs' claim is that the compensation provided to State-paid judges is constitutionally inadequate.

Def. Br. 17, 22.

Having thus mischaracterized plaintiffs' claims, defendants go on to argue that the court below rejected any contention that judicial compensation in New York is, or could ever be, constitutionally inadequate: "the Trial Court ultimately concluded," say defendants, "that *nothing* in the New York Constitution required [them] to propose, adopt or approve an increase in judicial compensation, either to offset the effects of inflation or for any other reason." *Id.* at 4-5 (emphasis in original); *accord id.* at 7, 17, 22. Defendants also argue that "the unique history" of judicial pay in this State refutes any claim of constitutional inadequacy, because "[t]he salaries paid to judges in New York have often remained unchanged for periods much longer than the nine-year period to which Plaintiffs would attach constitutional significance." *Id.* at 4, 48; *accord id.* at 50. There being no issue of constitutional adequacy here, defendants conclude, "*[t]hat should have been the end of this case.*" *Id.* at 5 (emphasis added).

Defendants are wrong on all counts.

First, there simply can be no question that under the doctrine of separation of powers—by the creation of an independent Judiciary—the Constitution of the State of New York requires that judges receive adequate compensation. Defendants actually *conceded* the point below, and it is confirmed not only by funda-

mental constitutional principles, but also by extensive precedent applying those principles.

Second, the undisputed evidence, both in this case and in *Kaye*, establishes that current judicial compensation in this State does not meet the constitutional standard of adequacy. Indeed, defendants' account of "the unique history" of judicial pay, far from disproving any claim of inadequacy, actually confirms that the constitutional line has been crossed today.

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

It is surprising indeed to see defendants suggest here that there is no constitutional floor for judicial compensation. For they conceded the point below. Justice Lehner put the question rather directly to the Assistant Attorney General who was then representing defendants. "*So there is a stage where the salary could be so low that it could be constitutionally objected to, right*? . . . *Without any proviso.*" The answer was unqualified. "*Yes*." R323 (emphasis added). Not only was there no proviso, but the Assistant Attorney General also went on to concede that "[i]f we're paying our Supreme Court justices the entry level salary for Assistant District Attorneys or Assistant Attorneys General or an agency counsel, maybe then we're at the line where it is on its face too low to comply with the separation of powers." R325. The principle isn't at issue, only the amount.

The principle flows from the separation of powers. At the heart of the tripartite government established in the New York State Constitution is the separation

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

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

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

One method by which the Constitution protects the independence of judges is through the Compensation Clause's guarantee against the diminishment of judicial pay. But it is not the only way. As the court below rightly observed, often "'[t]he concept of separation of powers is not one that is capable of precise legal definition.'" R52 (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 below: that the State Constitution guarantees a 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*, 588 Pa. 539, 577, 905 A.2d 918, 940 (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 federal Framers chose to prohibit only legislative diminution of judicial salaries, while entrusting to Congress the power to increase salaries to make up for what Hamilton called "fluctuations in the value of money and the state of society." THE FEDERALIST NO. 79. Thus, it is to protect against inadequacy that the Constitution both prohibits diminution and allows for judicial pay "from time to time [to] be altered, as occasion shall *require*." *Id.* (emphasis added). Ensuring adequacy, in other words, was understood to be a *requirement*—not an option.[1]

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[1] Utterly bizarre and nonsensical, to say the least, is defendants' argument that the only constitutional "meaning of 'judicial independence'" is independence from influence from the power of legislators to increase judges' pay, and that the only way to protect judicial independence is to "deny[] the Legislature the power to increase judicial compensation." Def. Br. 54. That would mean that neither the federal Constitution nor the State Constitution protects judicial independence, because both charters allow the political branches to increase judges' pay. Defendants' argument could not help them in any event, because it effectively concedes that
(footnote continued)

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*?" IV PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1867-68, at 2440 (emphasis added), *reprinted at* R244.

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

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(footnote continued)

where judges have to beg, and sue, legislators for pay adjustments—as is now the case in New York—their independence must surely be at risk.

Legislature made clear, the object of the change was to guarantee adequate compensation:

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

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

Put simply, with the legislative power to set judicial compensation comes an unequivocal *duty* to set that compensation at adequate levels. And the case law so holds. Indeed, far from rejecting this proposition, the court below rightly 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," 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.

Glancey v. *Casey*, 447 Pa. 77, 86, 288 A.2d 812, 816 (1972) (emphasis added), *quoted at* R56.

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

Pennsylvania does not stand alone. In New York, there are the decisions of the Third Department in *Kelch* v. *Town Board*, 36 A.D.3d 1110 (3d Dep't 2007), and of the Fourth Department in *Catanise* v. *Town of Fayette*, 148 A.D.2d 210 (4th Dep't 1989). As the court below observed, both *Kelch* and *Catanise* involved town justices *not* protected by "the no-diminishment-in-compensation pro-

vision" of the state Constitution's Compensation Clause. R55. 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 at* R55. The *Kelch* court relied on the precedents from Pennsylvania. 36 A.D.3d at 1111-12 (citing *Goodheart*, 521 Pa. at 320-22, 555 A.2d at 1211-13, and *Commonwealth ex rel. Carroll* v. *Tate*, 442 Pa. 45, 52-53, 274 A.2d 193, 197, 199 (1971)).

The Third and Fourth Departments 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 *Burby*, 155 N.Y. at 283)).

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

B. 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 thoughtful Penn-

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

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

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

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

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

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

To determine what "a level of remuneration proportionate to [judges'] learning, experience, and [the] elevated position they occupy," and to find what is needed "to secure a succession of learned men" and women to the bench, thus requires a comparative analysis. The separation-of-powers analysis must look to what judges make elsewhere, to what other lawyers, and other professionals, make in both the private and public sectors, and inquire whether judicial pay is commensurate, given what judges do and what is expected of them. Also relevant are historical levels of judicial pay. *Goodheart*, for example, looked to "the salary offered in the federal judicial system," in part because state courts "compete" with that salary. 521 Pa. at 325, 555 A.2d at 1214. The court also considered "the compensation [that had been] established as adequate by the legislature" in the past. *Id.* at 327, 555 A.2d at 1215.

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. 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.

Specifically, 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 for most judges have declined in real terms by at least 37 percent.[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. R400.

As a result, New York judges' salaries have fallen far behind their colleagues in other states. According to a May 2007 report of the nonpartisan National Center for State Courts ("NCSC"), the State of New York had the dubious distinction of ranking 48th in the Nation in judicial pay when the State's high cost of living is taken into account. R399. Since the report was issued, one of the two states that ranked behind New York—Oregon—raised its judicial salaries.[3] New York has thus fallen to 49th among the states. Even this woeful ranking may not

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[2] According to the CPI database at the website of the U.S. Department of Labor's Bureau of Labor Statistics, *see* http://www.bls.gov, the Consumer Price Index for the New York City metropolitan area was 175.0 in January 1999 and 240.55 in August 2008, an increase of 37.4 percent.

[3] *See Legislature Raises Judicial Salaries*, CAPITOL INSIDER (Or. St. Bar Pub. Affairs Comm., Tigard, Or.), July 9, 2007, *available at* http://www.osbar.org/_docs/lawimprove/capinsider/ci_070709.pdf.

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.

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. In January 1999, for example, both groups of judges earned $136,700 per year; but since then, 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.[4] 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."[5]

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

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[4] *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL SALARIES SINCE 1968 (2008), *available at* http://www.uscourts.gov/salarychart.pdf.

[5] CHIEF JUSTICE JOHN G. ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2007), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf.

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. R400-01; *see also* Exhibit C to this brief. So, too, New York judicial salaries lag well behind those who lead many not-for-profit organizations. R402 n.29; *see also* Exhibit D to this brief.

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.[6] 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.[7]

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. R402. 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

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[6] *The Am Law 100 2008*, AM. LAW., May 2008, at 200, 211.

[7] NEW YORK STATE BAR ASSOCIATION, THE 2004 DESKTOP REFERENCE ON THE ECONOMICS OF PRACTICE IN NEW YORK STATE 48 (2004).

make.[8] (See also Exhibits E and F to this brief.) Thus, as the court below observed, 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." R13.

C. The "unique history" cited by defendants demonstrates that judicial salaries are inadequate today.

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 Justice Lehner noted, "all parties have agreed that the judiciary is entitled to an adjustment," and "all parties have agreed" even on "the amount thereof." R53. The Attorney General's Office represented below, in fact, that "[t]here is a great deal of positive feeling in favor of an increase [in the salary of State Supreme Court Justices] to the current salary of federal judges ($169,300) [and] no governor or member of the legislature, to my knowledge, has spoken to the contrary." R47 (quoting R613). And in their opening brief in this Court, defendants flatly concede that there is *no*

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[8] *See Associates Survey*, AM. LAW., Sept. 2007, *available at* http://www.law.com/jsp/tal/PubArticleTAL.jsp?hubtype=Cover%20Story&id=1188378153076 (reflecting, among other things, that median salary and bonus of third-year associates at the major New York City firms are $185,000 and $40,000, for a total compensation of $225,000; for fourth-year associates, $210,000 and $45,000, for a total of $255,000; and for fifth-year associates, $230,000 and $50,000, for a total of $280,000—twice the $136,700 earned by a Supreme Court Justice).

"doubt that a judicial pay increase is *well deserved*." Def. Br. 2 (emphasis added). In short, there is "no open policy issue to be resolved" here. R53.

Instead of arguing that judicial pay is adequate, defendants make a historical argument. They 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 periods much longer than the nine-year period to which Plaintiffs would attach constitutional significance." Def. Br. 48; *accord id.* at 50. Recounting at length what they call "the unique history" of judicial pay in New York State, *id.* at 4, they say that "this history plainly shows" that "a 10-year period without a judicial salary increase is hardly unusual," *id.* at 49. 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 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 48. 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 can be calcu-

lated by taking judicial notice of historical price data[9]—and it comes out to ***$228,418*** and ***$239,839***. As for the 39 years of salary stagnation that followed, what 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*. 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. Even as late as 1916, the year before the United States entered World War I, $10,000 was still worth ***$198,744***.

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. *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

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[9] Historical price levels and current dollar calculations in this discussion are based upon 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), and U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index Data, *available at* http://www.bls.gov.

Court of Appeals were raised to $22,000 and $22,500. Def. Br. 48. Those salary figures would be the equivalent of ***$269,260*** and ***$275,379*** today.

Similarly, defendants note that salaries were not raised again until 1947, *id*. at 49; but again, the story remains the same. There was *deflation* during the Great Depression; inflation did not come until World War II, and the Legislature promptly remedied it not long after the troops started coming home. The $25,000 and $25,500 salaries set in 1947 (*id.*) would be worth ***$242,860*** and ***$247,718*** today. The 1952 salaries of $32,500 and $35,000 cited by defendants (*id.*) would be ***$265,680*** and ***$286,117*** today. Finally, the 1975 salaries of $60,575 and $63,143 (*id.*) would amount to ***$243,912*** and ***$254,252*** today.

(Attached as Exhibit A is a graph illustrating these figures. It shows judicial compensation from 1887 to 2008 (the 121-year period referenced by defendants, *see id.* at 48-50) in 2008 dollars, and it demonstrates that, over this lengthy period of time, real judicial pay was well in excess of what it is today, and that it is now near an historic low—the lowest it has ever been without prompting a significant remedy by the Legislature. And attached as Exhibit B is another graph, one showing how New York judicial salaries have fared against federal judicial salaries in real terms since 1975.)

In short, 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[10] (the equivalent of ***$406,130*** today) and in 1936 in the middle of the Depression they were $25,000[11] (the equivalent of ***$389,625*** today). And history shows that the Framers of the current Compensation Clause, which dates back to 1925, acted quickly to respond to sudden inflation, thus allowing the Legislature to restore judicial salaries to real levels far greater than what plaintiffs ask for today. Given this history that defendants themselves invoke, there can be no dispute that judicial salaries in New York State are constitutionally inadequate.

POINT II

DEFENDANTS HAVE VIOLATED THE COMPENSATION CLAUSE BY DISCRIMINATING AGAINST JUDGES.

Both the *Kaye* case and this one involve claims that defendants violated the Compensation Clause, or the "no diminishment" clause, of the New York State Constitution, N.Y. CONST. art. VI, § 25(a).[12] Still, the claims are different. The *Larabee* plaintiffs assert that defendants' failure to adjust judicial salaries in the face of inflation, by itself, violated the Compensation Clause.

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[10] *The Salaries of the Judges*, N.Y. TIMES, Jan. 24, 1909.

[11] *Pay Rises Listed in Court Budgets*, N.Y. TIMES, Sept. 11, 1936.

[12] "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). This mirrors the federal Compensation Clause, which guarantees that judges shall receive a "Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

In *Kaye* v. *Silver*, the Chief Judge and the Judiciary assert a narrower claim under the Compensation Clause, a claim that is premised upon unconstitutional *discrimination*. The claim is that under *United States* v. *Hatter*, 532 U.S. 557 (2001), defendants violated the Compensation Clause when they discriminated against 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.* Justice Lehner did not address this claim in *Larabee*; presented simply with a claim in which *no* "particularized discriminatory impact on judges" was alleged, he 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." R18-19 (emphasis added). As is shown below, even if this Court were to accept this holding, it would not absolve defendants under the Compensation Clause.

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 United States Supreme Court held that the Compensation Clause "offers protections that extend beyond a legislative effort directly to diminish a judge's pay, say, by ordering a lower salary." 532 U.S. at 569. Because a tax diminishes the real value of judges' salaries, only "a generally applicable, *nondiscriminatory* tax to the salaries of federal judges" is permitted by the Compensation Clause. *Id.* at 567 (emphasis added); *see also O'Malley* v. *Woodrough*, 307 U.S. 277, 282 (1939) ("[A] *non-discriminatory* tax laid generally

on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1 of the Constitution." (emphasis added)). 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).

Judges and the President of the United States did not have that option, however, because their pensions were noncontributory. As a result, even though the Social Security tax was imposed broadly, the real effect—in violation of the Compensation Clause—was to impose *almost exclusively* on judges the 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).[13]

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." R18. But here, others *did* receive salary adjustments, and so there *has* been a "particularized discriminatory impact."

As in *Hatter*, New York judges have, whether purposefully or not, been "single[d] out for specially unfavorable treatment" vis-à-vis nearly all other State employees. Specifically, defendants have *refused* to adjust judicial salaries and have perpetrated the longest judicial pay freeze in the Nation, effectively reducing

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[13] *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).

judicial salaries by 37 percent in real terms since 1999. During this same period of time, however, defendants have *repeatedly approved* salary increases for virtually all other State employees—approximately 195,000 of them—to account for inflation. As is reflected in the record in this case, the National Center for State Courts found that these salary increases for non-judicial employees totaled *over 24 percent* between January 1999 and May 2007. R400. Also in the record in this case is a chart, submitted by plaintiffs, that shows how numerous State employees who earned less than judges in 1999 have now leapfrogged over them, and earned more than judges did in 2008. R377-84. (A pair of scatter graphs presenting this data, and illustrating the salary leapfrogging the data reflects, is attached to this brief as Exhibit G.)

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 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 Justice'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). And 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 the charge of discrimination. For many reasons, the effect on judges has been considerably more severe. State legislators are not in the same category as judges and other full-time State employees. They are already among the best-paid in the Nation; according to the National Conference of State Legislators, among legislators who receive annual salaries, New York lawmakers rank *third*.[14]

And of course, many legislators earn much more than these amounts. In addition to their already-competitive base salaries, many legislators earn thousands or tens of thousands of dollars more for their service on committees and in other leadership posts. *See* LEGIS. LAW § 5-A. Even more critically, they are free to hold outside jobs. Judges, of course, cannot. They are constitutionally and ethically prohibited from supplementing their frozen salaries with additional employment, except in 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

[14] *See* NAT'L CONFERENCE OF STATE LEGISLATURES, LEGISLATOR COMPENSATION 2008, *at* http://www.ncsl.org/programs/legismgt/about/08_legislatorcomp.htm.

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 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. The Supreme Court rejected that argument. 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." *Id.* 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).

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 inde-

pendence 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.

POINT III

NEITHER THE SPEECH OR DEBATE CLAUSE NOR THE SEPARATION OF POWERS BARS RELIEF ON JUDICIAL-SALARY CLAIMS.

Defendants' principal challenge to Supreme Court's ruling on "linkage" in this case is to argue that it is inconsistent with the Speech or Debate Clause of the State Constitution, N.Y. CONST. art. III, § 11, as well as the principle of separation of powers generally. Indeed, in *Kaye* v. *Silver*, defendants contended that *all* of the Chief Judge's and the Judiciary's claims, not just the "linkage" claim, were barred on these grounds. These arguments are without merit.

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

1. The Speech or Debate Clause does not bar claims against non-legislative defendants.

As a preliminary matter, in addressing defendants' contentions under the Speech or Debate Clause, it is important to remember that the clause bars only claims against legislators, and sometimes their aides—and does *not* bar claims against others, including the State. As the United States Supreme Court has explained, "[l]egislative immunity does not, of course, bar all judicial review of legislative acts," as "[t]he purpose of the protection afforded legislators is *not* to forestall judicial review of legislative action . . . ." *Powell* v. *McCormack*, 395 U.S. 486, 503, 505 (1969) (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)) (emphasis added). Rather, the purpose of the Speech or Debate Clause is "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." *Id.* at 505.

That means that even if claims in an action are dismissed against legislators, the same claims, if they are not otherwise barred, may still proceed against defendants who are *not* protected by legislative immunity. "Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves." *Id.* Thus, the Court in *Powell* v. *McCormack* emphasized that even when it has "dismissed [an] action against members of Congress," it "did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action" when unprotected defendants, such as "congressional employees," "were also sued." *Id.* at 506

(discussing *Kilbourn* v. *Thompson*, 103 U.S. 168, 198-200 (1880), and *Dombrowski* v. *Eastland*, 387 U.S. 82, 84-85 (1967)). Put another way, as the Third Department has explained, courts applying the Speech or Debate Clause have "proceeded to review the constitutionality of the underlying acts [when] at least one party respondent, who was not immune under the Speech or Debate Clause, remained after the legislators were dismissed from the case." *Straniere* v. *Silver*, 218 A.D.2d 80, 85 (3d Dep't) (discussing *Powell*, *Dombrowski*, and *Kilbourn*), *aff'd*, 89 N.Y.2d 825 (1996).

Accordingly, even if claims against the legislative defendants are dismissed under the Speech or Debate Clause, the claims against the State should stand. Indeed, defendants did *not* assert otherwise below in either this case or in *Kaye* v. *Silver*.[15]

2. The Compensation Clause claims in this case and in Kaye, *and the inadequacy claim in* Kaye, *do not implicate Speech or Debate Clause protections.*

It is also worth noting preliminarily that defendants' Speech or Debate Clause defense, by its own terms, has *no* applicability to claims other than the "linkage" claim. For the argument that defendants make here is that "'linkage'" is

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[15] *See* Defendants' Memorandum in Support of Motion To Dismiss and for Change of Venue at 27-29, *Larabee* v. *Spitzer*, Index No. 112301/07 (filed Oct. 30, 2007) (asserting only that claims against the Governor should be dismissed under the Speech or Debate Clause); Memorandum of Law in Support of Motion To Dismiss by Defendants Silver, Assembly, Paterson, and State at 33-42, *Kaye* v. *Silver*, Index No. 400763/08 (filed June 10, 2008) (asserting that all defendants *except the State* should be dismissed).

simply a "possible motive for the fact that the Legislature and Governor never agreed upon a law increasing judicial compensation." Def. Br. 28. They contend that "the Speech or Debate Clause forecloses any such inquiry into legislative motives," and that thus "the motivation for Defendants' not enacting judicial pay increases is simply not a topic that may be examined in a judicial forum." *Id.*

The Chief Judge's and Judiciary's salary-inadequacy claim under the separation-of-powers doctrine, as well as the Compensation Clause claims in this case and in *Kaye* v. *Silver*, do not depend upon legislative motives. Those claims do not even arguably challenge why legislators have failed to do what they should have done; they straightforwardly allege that legislative and executive actions and inactions themselves violate the State Constitution. That, of course, is exactly the sort of straightforward "judicial review of legislative acts" that unquestionably "[l]egislative immunity does not . . . bar." *Powell*, 395 U.S. at 503. As the Supreme Court said in *Kilbourn* v. *Thompson*:

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

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

3. Because the judicial compensation claims brought by the Chief Judge and the Judiciary present an inter-branch conflict involving the separation of powers, the Speech or Debate Clause does not apply in Kaye.

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

While rarely presented to the courts, the unique nature of a separation-of-powers challenge brought *by one coequal branch against another* squarely implicates these principles. Thus, while the Speech or Debate Clause protects the independence of the Legislature, it cannot be interpreted so broadly as to trump the

separation-of-powers principle embodied in the tripartite structure of government. The Speech or Debate Clause is just one provision in the legislative article of the Constitution. It has never been construed to bar an action, brought by one branch of government against another, based on the broader separation-of-powers principle that forms the foundation of the State Constitution and guarantees the independence of the Judiciary.

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

> [O]ur speech or debate clause does not immunize from judicial review a colorable constitutional claim, made in good faith, that the legislature has violated the separation of powers by exceeding the bounds of its impeachment authority and, therefore, has conducted itself outside the sphere of legitimate legislative activity.

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

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

The Connecticut court analyzed the scope of the Speech or Debate Clause within the context of the overall Constitution. Noting that the clause is only one provision of the Constitution's article governing legislative powers, the court concluded that the Speech or Debate Clause cannot be construed in a way that undermines the separation-of-powers principle that forms the basis of the state Constitution. The court stated that the Speech or Debate Clause "cannot be viewed . . . as categorically trumping the separation of powers provision, which forms the very structure of our constitutional order and which governs, therefore, all three coordinate branches of government." *Id.* at 564-65, 858 A.2d at 724. And the Court 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 568, 858 A.2d at 726 (emphasis added).

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

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

shield to suit: "If it were, this court's duty to interpret and enforce the Pennsylvania Constitution would be abrogated, thus rendering ineffective the tripartite system of government which lies at the basis of our constitution." *Id.* at 331, 681 A.2d at 702.

Finally, at least as far as the claims brought by the Chief Judge and the Judiciary are concerned, defendants' reliance on *Doe* v. *McMillan*, 412 U.S. 306, 312-13 (1973), and *Straniere* v. *Silver*, 218 A.D.2d 80, 84 (3d Dep't), *aff'd*, 89 N.Y.2d 825 (1996), for the proposition that legislative immunity applies even to illegal or unconstitutional acts (Def. Br. 29-30), is unavailing. Those claims involved claims brought by *private parties* against legislators. The claims brought by the Chief Judge and the Judiciary in *Kaye* do not; they are brought by and on behalf of an independent branch of government. Claims by private parties who complain of the improper exercise of legislative authority "*are poles apart*" from separation-of-powers claims brought by a branch of government against another co-equal branch that has unconstitutionally undermined it and thereby "has conducted itself outside the sphere of legitimate legislative activity." *Office of the Governor*, 271 Conn. at 560, 567, 858 A.2d at 722, 726 (emphasis added).

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

Finally, defendants argue that the separation of powers itself precludes the plaintiff's separation-of-powers claim. Defendants argue that plaintiffs' claims threaten an "intru[sion] into the budget-making or appropriations process reserved

to the Governor and Legislature," and that Supreme Court's order "ended up usurping the separate powers reserved by the Constitution to the Legislature and Executive, thus defeating the objectives of the separation of powers doctrine." Def. Br. 32, 30. In essence, defendants argue that judicial review of any budgetary matter violates the separation of powers.

But judicial review, even over constitutional matters that involve the expenditure of funds, cannot and does not threaten the balance of power among the branches of government. Judicial review does *not* "by any means suppose a superiority of the judicial to the legislative power." THE FEDERALIST NO. 78 (Hamilton). Even with the power of judicial review, the Judiciary remains "beyond comparison the weakest of the three departments of power," and "it can never attack with success either of the other two" branches; the Judiciary is and 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." *Id., quoted at* R52-53. 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*, 211 Ill. 2d 286, 300, 811 N.E.2d 652, 660 (2004).

In particular, no serious infringement of the legislative or executive powers could occur as the result of a court order requiring a judicial pay adjustment.

Judicial compensation concerns only *one* discrete subject under the political branches' purview. And on that subject, as the court below recognized, 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." R53. Indeed, if the Legislature's budgetary power over the Judiciary were excluded from judicial review, our tripartite system of government would threaten to become a bipartite one. As one court put it:

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

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

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

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

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

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

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

Id. (emphasis added). And the courts of sister states have held that difficult financial circumstances do not excuse the political branches' failure to adequately provide funding to the court system:

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

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

Contrary to defendants' various suggestions, moreover, the courts have the constitutional power to order relief. Part and parcel of judicial review is the power to order relief. As recently as last year, for example, in *Kelch* v. *Town Board*, the Third Department affirmed the Judiciary's inherent power to order the State to make higher salary payments:

> 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* v. *Casey*, 521 Pa. 316, 320-22, 555 A.2d 1210, 1211-1213 (1989)); *accord, e.g.*, *New York County Lawyers' Ass'n* v. *State*, 196 Misc. 2d 761, 775, 790 (Sup. Ct. N.Y. Co. 2003) (holding that compensation rates for assigned private counsel "seriously impaired the courts' ability to function" and ordering mandatory permanent injunction); *McCoy*, 73 Misc. 2d at 513 (ordering City executive officials to disburse funds for a housing court).

And, once again, courts of other states have redressed constitutional violations by compelling the political branches to remit funds for the Judiciary. The Pennsylvania courts, as already noted, ordered a pay adjustment for judges. In doing so, those courts recognized that the general principle that:

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

Tate, 442 Pa. at 52, 274 A.2d at 197 (emphasis added in part). This inherent power is essential to the separation of powers: "the Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed." *Id.* at 53, 274 A.2d at 197; *accord*, *e.g.*, *Goodheart*, 521 Pa. at 321, 555 A.2d at 1212 (judicial branch "has the inherent power to ensure the proper functioning of the judiciary by ordering the executive

branch of government to provide appropriate funding so that the people's right to an efficient and independent judiciary is upheld"); *Stilp* v. *Commonwealth*, 588 Pa. 539, 582-83, 905 A.2d 918, 944 (2006).

So, too, the Illinois Supreme Court declared its "authority to require production of the facilities, personnel and resources necessary to enable the judicial branch to perform its constitutional responsibilities," including payment of the judicial salaries required by law. *Jorgensen* v. *Blagojevich*, 211 Ill. 2d 286, 312, 811 N.E.2d 652, 667 (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. The court explained: "We have never doubted the inherent power of a constitutional court to sustain its existence. . . . The legislature may not abolish th[e] court. Neither is it permissible for the legislature to render the court inoperative by refusing financial support." *Judges for the Third Judicial Circuit* v. *County of Wayne*, 386 Mich. 1, 14, 190 N.W.2d 228, 231 (1971).

Still other states are in accord. *E.g.*, *In re Salary of the Juvenile Director*, 87 Wash. 2d 232, 245, 552 P.2d 163, 171 (1976) ("courts possess inherent power" to order funding judicial branch); *Smith* v. *Miller*, 153 Colo. 35, 41, 384 P.2d 738, 741 (1963) (courts possess "inherent power to carry on their functions . . . and may incur necessary and reasonable expenses"); *Carlson* v. *State ex rel. Stodola*, 247 Ind. 631, 638, 220 N.E.2d 532, 536 (1966) ("court ha[s] authority to provide for the payment of expenses necessary for its proper functioning"); *Noble County*

Council v. *State ex rel. Fifer*, 234 Ind. 172, 180, 125 N.E.2d 709, 713 (1955) ("court has inherent and constitutional authority to employ necessary personnel with which to perform its inherent constitutional functions and to fix the salary of such personnel, within reasonable standards, and to require appropriation and payment therefor").

In short, as one court of a sister state put it:

> 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.

O'Coin's, Inc. v. *Treasurer of Worcester County*, 362 Mass. 507, 510-11, 287 N.E.2d 608, 612 (1972) (emphasis added). If courts thus have the inherent authority to protect the Judiciary by directing expenditures on "facilities," "supplies," and "supporting personnel," then surely they have the power to ensure that judicial salaries not be permitted to fall to a level where they are constitutionally inade-

quate. For the reasons set forth in this brief, the time to exercise this power is now. It is long overdue.

Conclusion

It is respectfully submitted that the order of the Supreme Court entered February 7, 2008, to the extent that it dismissed plaintiffs' first cause of action and dismissed the Governor from the action, should be reversed, and defendants' motion to dismiss denied in its entirety; and that the order of the Supreme Court entered on June 11, 2008 granting summary judgment to plaintiffs should be modified to direct defendants immediately to pay plaintiffs constitutionally adequate compensation, but otherwise affirmed.

Dated: New York, New York
October 23, 2008

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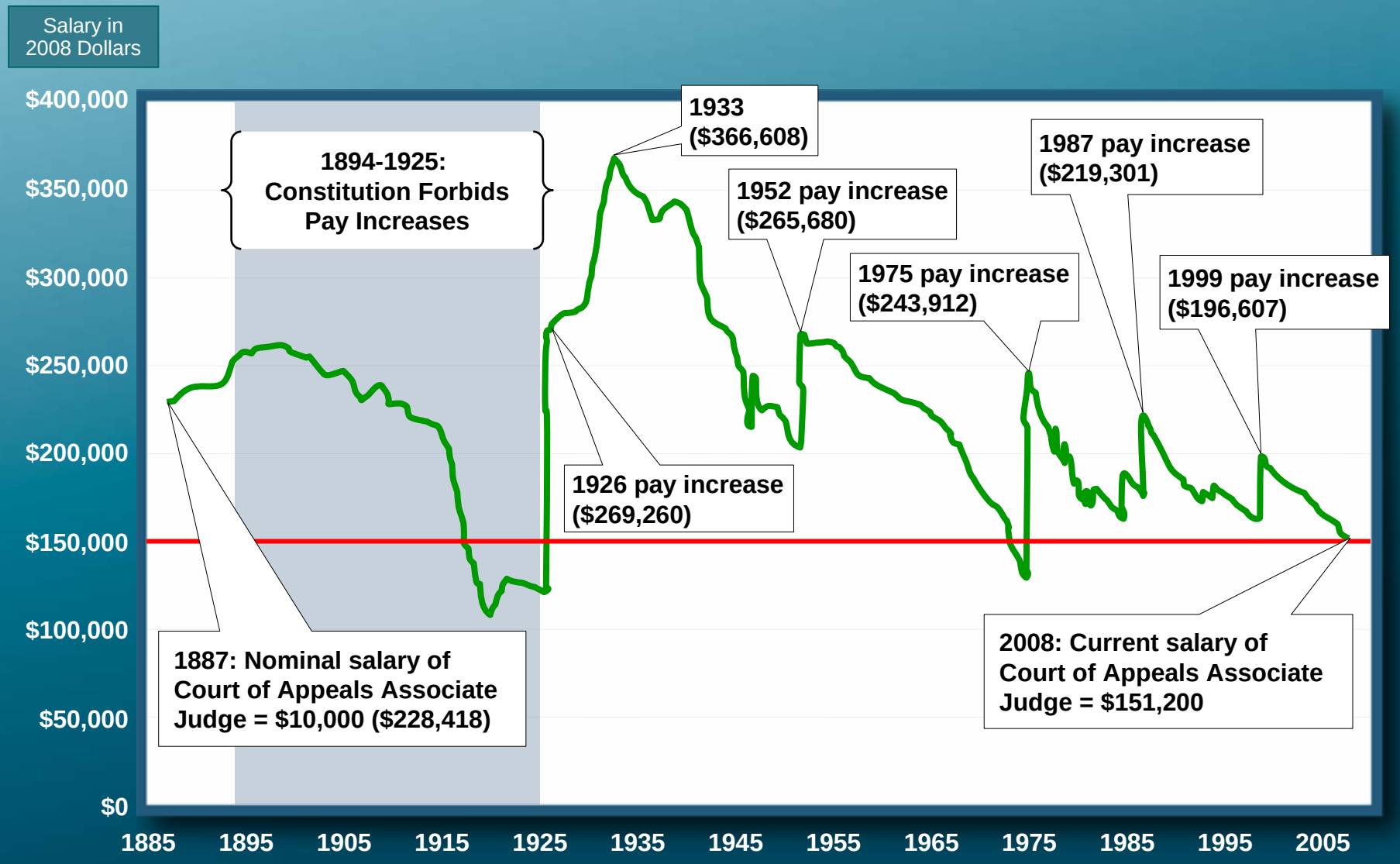
PRINTING SPECIFICATIONS STATEMENT

The following Printing Specifications Statement is made in accordance with §600.10(d)(1)(v) of the Rules of the Appellate Division, First Department:

The foregoing brief was prepared using the word processing system Microsoft Word 2003, with Times New Roman typeface, 14-point font. The text of the brief has a word count of 13,809 as calculated by the word processing system used to prepare the brief.

EXHIBIT A

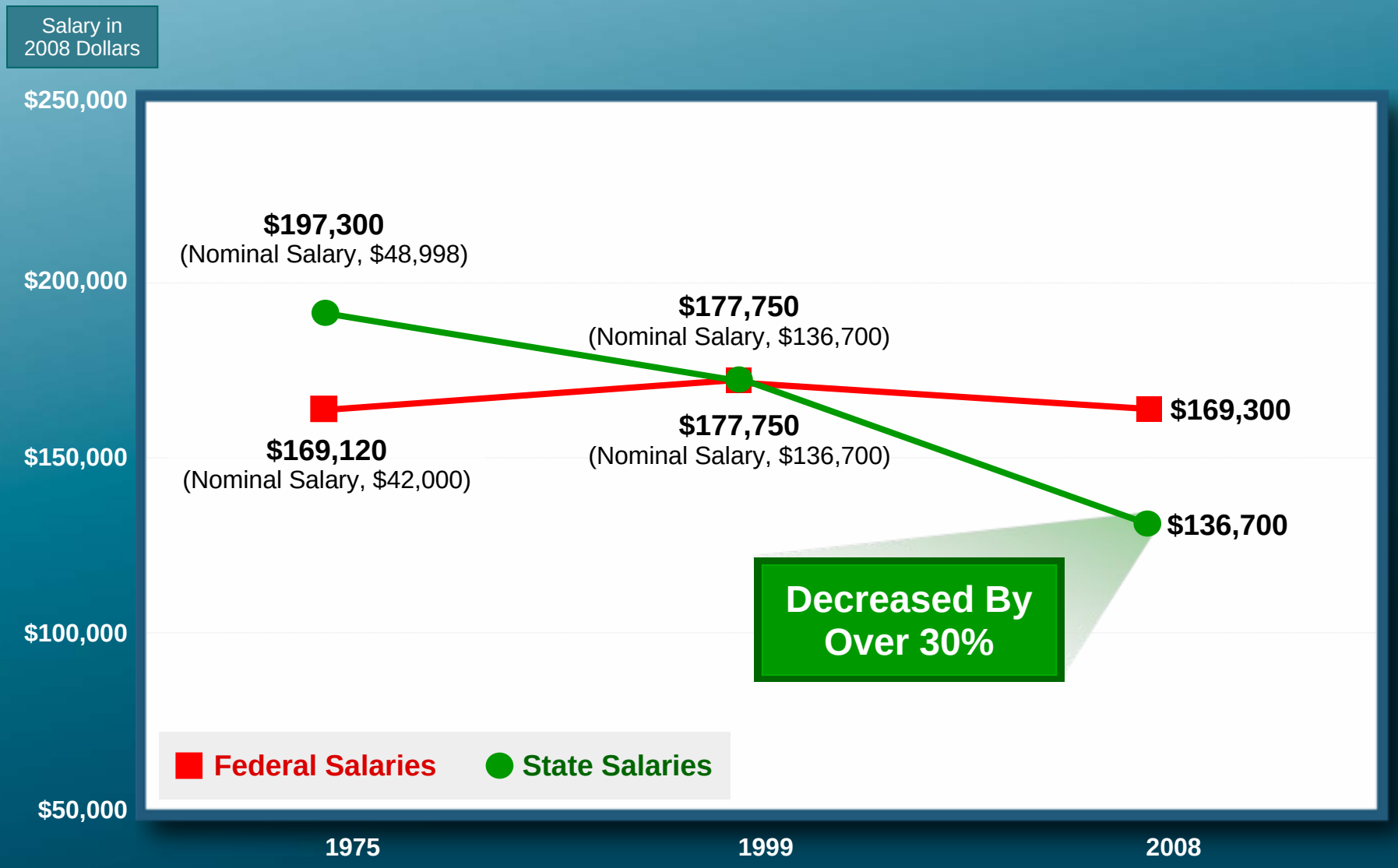
Inflation-Adjusted Salaries For NY Court Of Appeals Judge 1887 – 2008



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

EXHIBIT B

Inflation-Adjusted Salaries For Judges Since 1975



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

EXHIBIT C

Salaries: NY Public Officials And Public-Sector Employees

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

Source: NCSC Report at 10-11 (R400-01)

EXHIBIT D

Salaries: Non-Profit Sector – 2007

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

Source: NCSC Report at 12 (R402)

EXHIBIT E

Salaries: NYS Private-Sector Attorneys

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

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

Sources: The AM Law 100 2008, American Lawyer, May 2008; The 2004 Desktop Reference on the Economics of Law Practice in New York State

EXHIBIT F

Courtroom Salaries

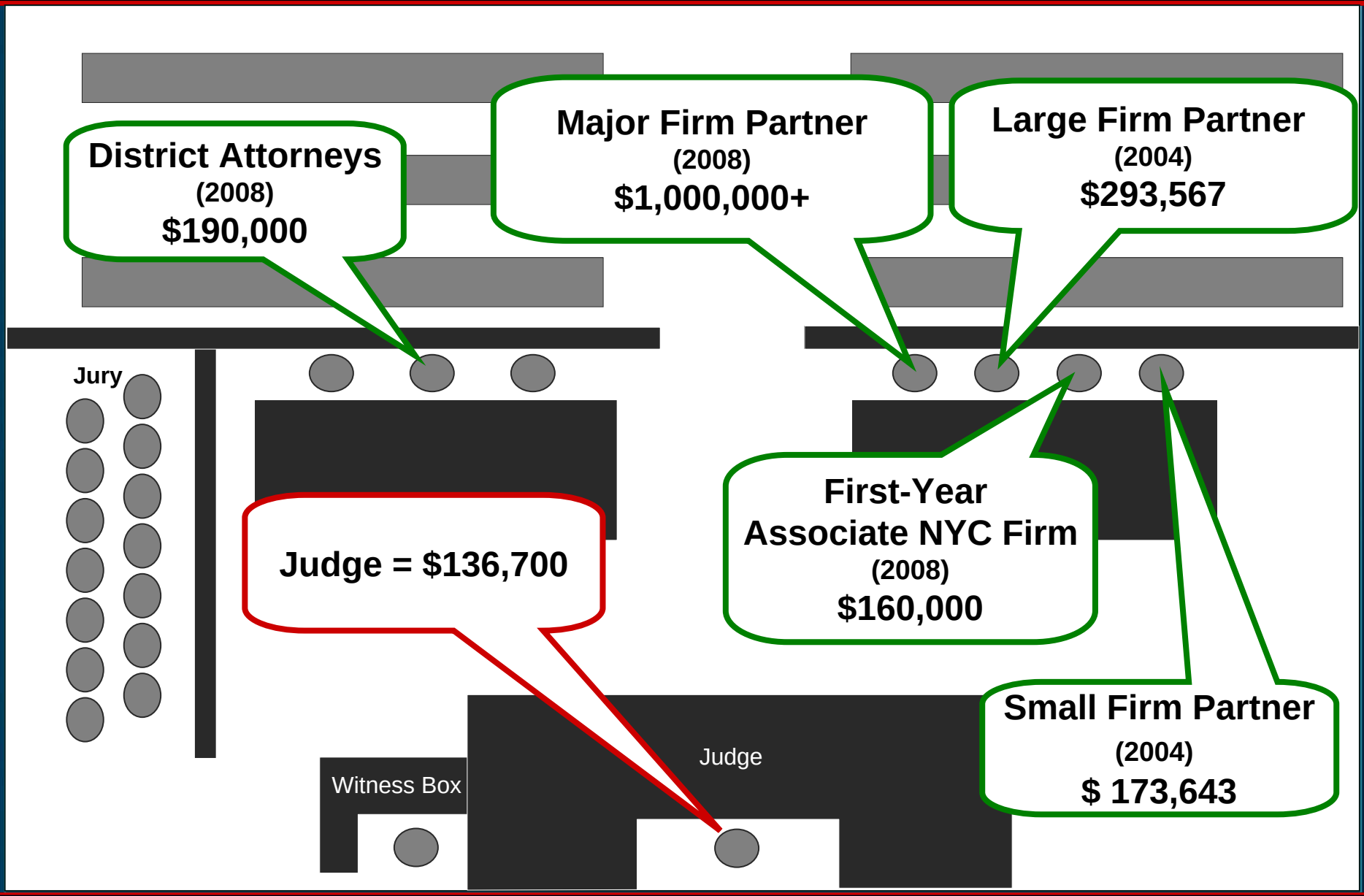
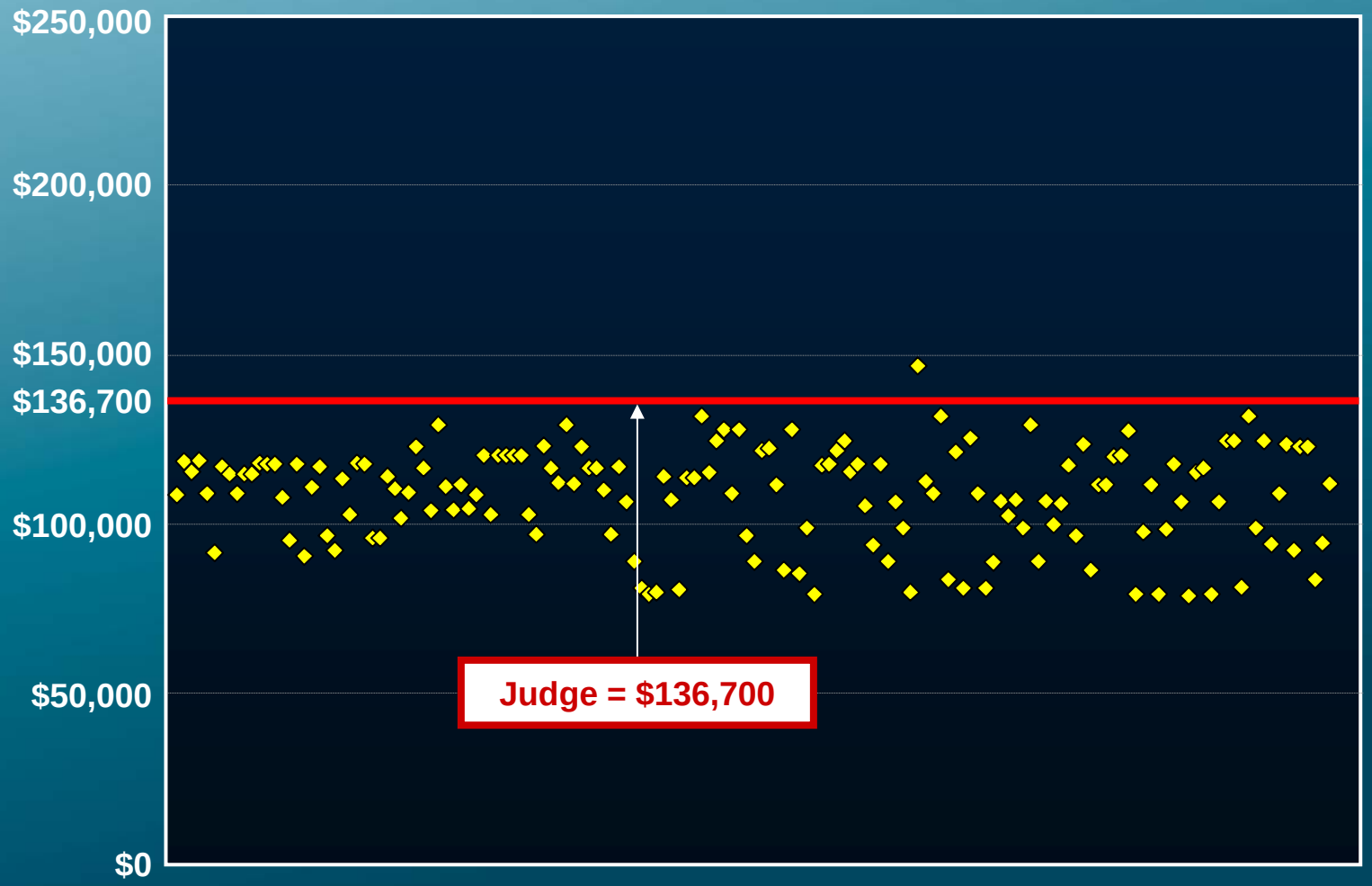


EXHIBIT G

Selected State Employees' Salaries – 1999

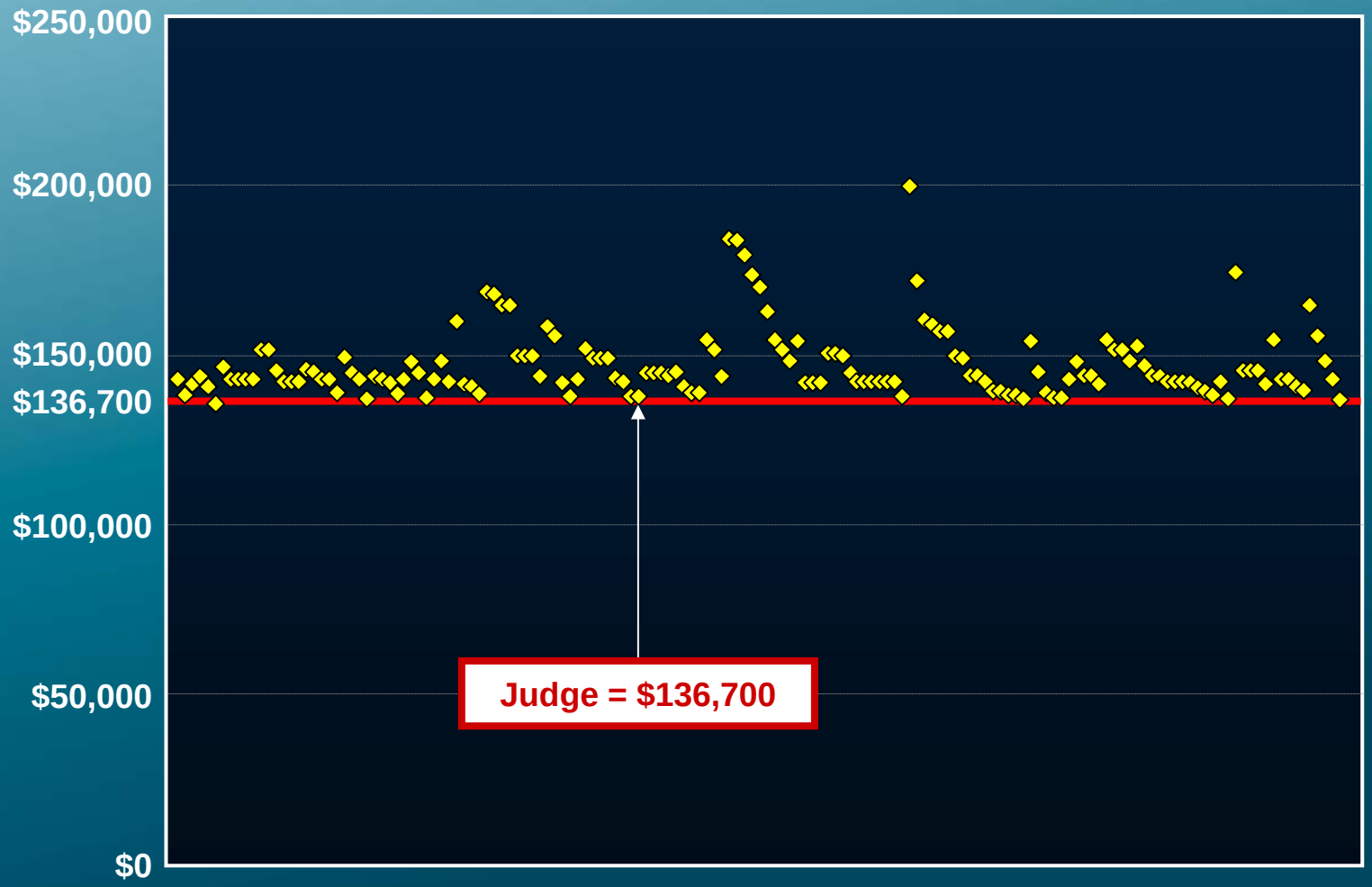
(40 State Departments or Agencies; 160 Senior Positions)



Source: R377-84

Selected State Employees' Salaries – 2007

(40 State Departments or Agencies; 160 Senior Positions)



Source: R377-84