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COURT OF APPEALS

STATE OF NEW YORK

LARABEE,

Appellant,

-against-

No. 52

GOVERNOR OF THE STATE OF NEW YORK,

Respondent.

SILVERMAN,

Appellant,

-against-

No. 53

SILVER,

Respondent.

20 Eagle Street
Albany, New York 12207
March 23, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

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1 JUDGE PIGOTT: Thank you. Good afternoon.
2 As you can tell, we're a five-member court for this -
3 - - these first two cases. Judge DiFiore has recused
4 herself, as has Judge Stein.

5 Mr. Bezanson, it's your nickel.

6 MR. BEZANSON: Good afternoon, Judge
7 Pigott. And I would like to reserve five minutes for
8 rebuttal, if I may.

9 JUDGE PIGOTT: Certainly.

10 MR. BEZANSON: And may it please this
11 honorable court, my name is Tom Bezanson and my
12 colleague Matt Povolny is with me; we're from Cohen &
13 Gresser.

14 JUDGE PIGOTT: Welcome.

15 MR. BEZANSON: And our co-counsel, the
16 Honorable George Bundy Smith is with us today too, as
17 you have already noted.

18 The liability of the defendants in this case has
19 already been established. The defendants violated the
20 Constitution for ten years and caused financial harm.
21 This harm is real. It was felt by 1,997 justice and
22 judges, year after year. 625 of those retired during the
23 period, and - - -

24 JUDGE RIVERA: Is - - - is the harm the ni
25 - - - the failure to actually come up with a payment

1 or is the harm the failure to consider judicial pay,
2 independent of any other political consideration?

3 MR. BEZANSON: Actually, Your Honor, it's
4 both. Because of their constitutional violation of
5 linking legislative pay to judicial pay and some
6 other legislative matters, the judicial pay was
7 frozen for ten years, all during a period of
8 inflation, and the annual inflation, as you see in
9 the consumer price index, stated at record 338,
10 varied from less than one percent to almost four
11 percent each of those years.

12 The result being at the end of - - - by
13 2009, at the end of the ten years, every justice and
14 judge in the state had lost thirty percent of the
15 value of one of their principal assets, their state
16 salary.

17 Their salary in 2009 was worth seventy
18 percent of what it was worth in 1999, all because of
19 the constitutional violation by the defendants.

20 JUDGE ABDUS-SALAAM: But counsel - - -

21 JUDGE GARCIA: Counsel - - -

22 JUDGE ABDUS-SALAAM: - - - didn't we, in
23 the last case, in the Maron case, dismiss the - - -
24 or essentially dismiss the compensation clause claim
25 - - -

1 MR. BEZANSON: Yes, Your Honor, you did.

2 JUDGE ABDUS-SALAAM: - - - that we decided
3 on the separation of powers doctrine?

4 MR. BEZANSON: That's correct, Your Honor,
5 and we are pursuing damages now strictly on the
6 separation of powers claim. And inflation was
7 discounted as a constitutional factor for the
8 purposes of diminishment under Article 6 Section 25,
9 or the no diminishment clause. However, in this
10 case, the separation of powers case, inflation plays
11 a rule because it is the measure of the lost value to
12 the 1,797 judges.

13 JUDGE GARCIA: Counsel, during that time
14 period, did the legislature give such raises to all
15 state employees?

16 MR. BEZANSON: During that period, Your
17 Honor, it gave very substantial raises to many of the
18 other state employees and - - -

19 JUDGE GARCIA: But is your position that
20 they had to give those types of cost of living raises
21 to the judiciary - - -

22 MR. BEZANSON: We are not saying - - -

23 JUDGE GARCIA: - - - even though they were
24 kind of picking and choosing.

25 MR. BEZANSON: We're not saying that they

1 had to give cost of living raises then, we're not
2 saying that they had to give cost of living raises
3 now; we're just saying that because of their
4 unconstitutional violation, they did not give raises,
5 and that caused actual financial harm.

6 But it - - - to answer your question, the
7 other members of the - - - other state employees
8 received very substantial raises during the period,
9 and our - - - and the record has a schedule showing
10 raises of up to thirty, forty, fifty percent for
11 hundreds, thousands of other state employees. But
12 this is not an equal protection case, and we're not
13 basing the damages on what others got; we're basing
14 it simply on the financial harm that the 1,797 judges
15 suffered.

16 JUDGE GARCIA: But couldn't the legislature
17 have considered this - - - we'll grant, they didn't -
18 - - but could they consider it and say, no, and we
19 don't think a cost of living raise in this particular
20 year is appropriate.

21 MR. BEZANSON: They could have done that,
22 but they didn't.

23 JUDGE GARCIA: So what would the remedy be
24 here? Why would we order them to do that when they
25 could have and they didn't?

1 MR. BEZANSON: Because we know what they
2 did do. What they did do is violate the
3 Constitution, and that violation caused financial
4 harm. And I hope that this Court will not allow a
5 constitutional harm to go without consequences.
6 Someone who violates the Constitution and causes
7 financial harm should not escape consequences for
8 their act.

9 JUDGE GARCIA: But I'm having trouble with
10 the first part, because if the legislature back then
11 could have said, look, given the financial - - -
12 given where we are, we're not giving cost of living
13 raises, what you're asking is for us to substitute,
14 retroactively, our judgment for the legislature and
15 order those types of raises?

16 MR. BEZANSON: I submit, Your Honor, I am
17 not asking that at all. If the legislature had
18 considered judicial pay independently on the merits
19 and decided none was warranted in the years 2000
20 through 2009, this case wouldn't be here; there might
21 be another case.

22 JUDGE GARCIA: So it's more of a punitive
23 damage you're looking for?

24 MR. BEZANSON: But this is - - - well, it's
25 not punitive; it's compensatory damage for the harm

1 that they caused. They caused the harm to the 1,797
2 judges.

3 JUDGE GARCIA: But I'm trying to measure
4 the harm if they didn't have to give the raises in
5 their discretion.

6 MR. BEZANSON: They had to not violate the
7 Constitution. They could have done that
8 constitutionally, but they didn't. Instead, they
9 chose to violate the Constitution.

10 JUDGE RIVERA: They - - - so if - - - are
11 you also arguing, or is the logical, sort of, end of
12 this argument that when - - - post-Marón, when the
13 legislature sets up the commission and man - - - and
14 gives the mandate to the commission that it's
15 prospective relief, only that you interpret that to
16 mean they did not consider whether or not retroactive
17 pay would have been appropriate; that they only
18 decide - - - they refused to address that question at
19 all and went straight to prospective; is that - - -

20 MR. BEZANSON: They granted prospective
21 relief, only the statute is utterly silent as to
22 retroactive pay.

23 JUDGE RIVERA: And you interpret that
24 silence as they never addressed the issue versus they
25 considered it and determined that retroactive pay was

1 not appropriate.

2 MR. BEZANSON: That is correct, Your Honor,
3 I interpret that to mean that the harm was done and
4 exists to this day without remedy.

5 JUDGE RIVERA: Is there any reason we can't
6 interpret it otherwise?

7 MR. BEZANSON: I don't think you - - -

8 JUDGE RIVERA: The silence means that the
9 legislature did consider this issue and decided it
10 wasn't appropriate.

11 MR. BEZANSON: Well, I don't think you can
12 consider legislative intent from silence. Byrne - -
13 - I think it's Byrne against the State makes this
14 clear; legislative silence is not a substitute for
15 intent.

16 JUDGE ABDUS-SALAAM: But can we consider
17 what the legislature said in setting up the pay
18 commission and that it was taking into account that
19 this court had essentially turned the issue of
20 whether judges should get paid over to the
21 legislature, not wanting to impose on the
22 legislature's, you know, discretion.

23 So can we consider what the legislature
24 said when it set up the pay commission as some
25 indication of whether it did consider retroactive

1 pay?

2 MR. BEZANSON: You can consider it to the
3 extent that they prevented prospective violations of
4 the Constitution. But they didn't address the ten
5 years of violation. Following the principle of the
6 Klostermann case - - -

7 JUDGE ABDUS-SALAAM: Did they have to?
8 What I'm asking, counsel, is did they have to say
9 explicitly, we've considered the pay - - - the period
10 between 1999 and 2010, and we've decided not to give
11 retroactive pay raises to the judges; did they have
12 to do it that way?

13 MR. BEZANSON: If they had said that, I
14 submit, Your Honor, it wouldn't have made a
15 difference because they were still leaving the harm
16 without a remedy. And this court, I think very
17 wisely said, following the principle of the
18 Klostermann case decided by this court in 1984, that
19 the court will articulate the constitutional
20 principle and then give the legislature or the state
21 a chance to make good, now that they know the
22 constitutional principle.

23 JUDGE FAHEY: What I am wondering though is
24 - - - what I'm wondering is, can the remedy itself be
25 the prospective pay increases, and can, for our

1 purposes, balancing judicial independence against the
2 legislative budget-making powers, consider that to be
3 adequate?

4 MR. BEZANSON: No, Your Honor, because that
5 only prevents future violations of the constitution
6 and doesn't answer for the past real violation. And
7 this court very wisely said, we will defer to the
8 legislature for now; however, this court retains - -
9 - the province of this court is to assess the action
10 of the legislature following our pronouncement of the
11 constitutional principle.

12 And this is the opportunity for the court
13 to make that assessment, and I urge upon you that a
14 legislature that ignores the ten years of harm that
15 they did is not a legislature to be deferred to any
16 further. This court itself can go ahead and award
17 the damages because the record is complete. We have
18 duty, we have breach, we have causation, and we have
19 damages. And I see I have a red light.

20 JUDGE PIGOTT: Nice timing, Mr. Bezanson.

21 MR. BEZANSON: Thank you very much.

22 JUDGE PIGOTT: Judge Silverman, welcome.

23 HON. SILVERMAN: May it please the court.

24 I feel that Mr. Bezanson has pretty much said what I
25 was going to say, so at this time I'd just like to

1 request five minutes of my time for any reply to Ms.
2 Dasgupta, if that's agreeable to the court.

3 JUDGE PIGOTT: Certainly.

4 HON. SILVERMAN: Okay, thank you.

5 JUDGE PIGOTT: Thank you.

6 Ms. Dasgupta, am I pronouncing your name
7 correctly?

8 MS. DASGUPTA: Yes, Your Honor.

9 Good afternoon, Your Honors. Anisha Dasgupta
10 for the state defendants. There is no legal basis for
11 granting plaintiffs' requested relief. First, money
12 damages are unavailable as a matter of law because
13 granting them would intrude on the legislature's authority
14 to budget and appropriate. Second - - -

15 JUDGE PIGOTT: Does that mean, though, that
16 at a minimum, they should take into consideration
17 what Mr. Bezanson is arguing that the violation
18 occurred, you know, over these years, and do
19 something. Either say, you know, now that we've been
20 found to have been violating the Constitution, we're
21 going to address this, and we're not awarding a
22 nickel.

23 MS. DASGUPTA: Well, the legislature
24 provided a complete remedy to the separation of
25 powers violation, Your Honor.

1 Maron identified a structural violation
2 requiring a structural remedy. And what the court
3 declared in that case was that when the legislature
4 addresses judicial compensation in present and future
5 budget deliberations, it must do so independently of
6 unrelated policy initiatives and legislative compensation
7 adjustments.

8 And that's exactly what the legislature did
9 here. It fully complied with Maron when it created an
10 independent commission on judicial pay. Maron recognized
11 that whether judicial pay should be adjusted, and if so,
12 by how much, was within the province of the legislature.

13 JUDGE PIGOTT: Let's speak in the abstract
14 a little bit. If it's conceded that there is a
15 violation of the Constitution because of the way this
16 was done and that - - - and that that violation goes
17 back to 1998 or 1999, and the remedy that the
18 legislature came up with was to say, okay, going
19 forward, we will no longer violate the Constitution
20 of the United States - - - or of the State of New
21 York, even though it's been found that we violated it
22 for the past thirteen years, shouldn't they do
23 something about the past thirteen years?

24 MS. DASGUPTA: Well, there are couple of
25 answers to that, Your Honor. The first is, the sort

1 of, should they have considered retrospective
2 adjustments, and they did. Maron didn't direct the
3 legislature to provide retrospective adjustments, but
4 the legislature was aware of proposals that
5 retrospective adjustments should be provided, and it
6 didn't - - -

7 JUDGE ABDUS-SALAAM: But what's the
8 evidence that they actually considered retroactive
9 pay?

10 MS. DASGUPTA: Well, this was not a low-
11 profile issue, and the sponsor's memo to the
12 legislation - - - I mean, thanks in part to the able
13 advocacy of my opposing counsel, but the sponsor's
14 memo in support of the legislation specifically
15 referenced this court's decision in Maron as the
16 triggering event for the legislation to be enacted.

17 And so plaintiffs can't really plausibly
18 assert that the legislature was unaware of the claims
19 for retrospective relief that were pressed in Maron.

20 So that - - - that goes to Your Honor's
21 point of when the legislature was considering the
22 separation of powers violation, did it provide a
23 complete remedy, it considered - - -

24 JUDGE RIVERA: But you are going to whether
25 or not they were aware, not whether or not they

1 actually then complied with their constitutional
2 obligation of think - - - considering judicial pay
3 separate and apart from any political consideration.

4 MS. DASGUPTA: Right, well, Your Honor,
5 that and the second half of Judge Pigott's question
6 goes to the issue of what was the violation and was
7 necessary to remedy it. And, you know, here, the
8 remedy that plaintiffs request money damages are
9 completely inappropriate because of separation of
10 powers concerns and because of the doctrine of
11 sovereign immunity.

12 But even if those were not a problem,
13 plaintiffs haven't shown an entitlement to the salary
14 adjustments that they seek, and that is really the
15 issue. When plaintiffs assert that there was a
16 constitutional violation that caused harm that had to
17 be remedied, the question is, what was that harm?

18 And here, the harm that they allege, that they
19 didn't receive cost of living adjustments, is in a sense
20 completely speculative because of the counterfactual. The
21 question is, had the legislature not committed these
22 violations, what would have happened, what would have been
23 the economics in play.

24 JUDGE PIGOTT: That's why I asked if they
25 considered it and said we're not - - - we're not

1 giving them a nickel, you would be - - - they would
2 be hard pressed to then say, they failed to del - - -
3 I think about the pensions, for example. You know,
4 let's assume for a minute, I don't think this - - -
5 the commission gave any thought, you know, to what
6 was - - - what was retroactive. And there are people
7 who are in the - - - in the retirement system who
8 relied upon whatever they were going to get, you
9 know, for their future. Was that considered - - -
10 was their future considered in the commission's final
11 report which awarded pay?

12 MS. DASGUPTA: Well, the commission's
13 report is separate from the legislation. Plaintiffs'
14 complaint here is that the legislature, when it
15 created the commission, didn't authorize it to
16 consider retrospective adjustments.

17 JUDGE PIGOTT: Right.

18 MS. DASGUPTA: But maybe one - - - a very
19 good answer to that might be some of the public
20 comments provided by Judge Lippman when the
21 legislation was passed. He noted that this was an
22 exceptionally bad time for the state economically and
23 in terms of the budget, and that it wasn't irrational
24 for the legislature to have decided to provide
25 prospective-only adjustments.

1 This was a time of mass layoffs and hiring
2 freezes, during the period of time at issue, the only
3 state employees - - -

4 JUDGE PIGOTT: During some - - - some of
5 the time, right. I mean, legis - - - the court
6 system seemed to be going great guns in, you know,
7 the beginning of the century, up until about '08,
8 '09.

9 MS. DASGUPTA: Well, from 2001 to 2010, it
10 was really a situation of continuous, multi-billion-
11 dollar budget gaps. There was a short period of time
12 when the state entered into some collective
13 bargaining agreements with state employees, unionized
14 state employees, that obligated them to provide some
15 cost of living increases.

16 The State subsequently tried to withhold
17 those, and the employees took them to court and got a
18 court order saying that those couldn't be withheld.
19 But the State did successfully withhold actually
20 enacted salary increases from management confidential
21 employees, and during this period of time, it also
22 didn't raise the salaries of not just the governor
23 and the legislation - - - the legislators, but also
24 the heads of all the major state agencies. So judges
25 are not alone here.

1 JUDGE FAHEY: You know - - - you know, I
2 understand that argument. What I don't understand is
3 in addressing the problem of a violation without a
4 remedy. That's - - - that's the core of their
5 argument. I think you can draw a rational
6 distinction between consideration for employees who
7 are still on the payroll, because you could argue
8 that the prospective pay increase was compensation
9 for even your retrospective failure to get an
10 increase.

11 But that doesn't apply to retired judges.
12 The retired judges is a harder problem, I think,
13 because they are off the payroll, as Judge Pigott
14 said, they have been damaged, and there is - - -
15 there is no - - - there is no compensation offered;
16 it doesn't appear to have been considered separately
17 anywhere. And so, there is no basis to say that the
18 legislature at least considered these damages and
19 their separate applicability to resolving the
20 question of a violation that everybody seems to have
21 admitted.

22 MS. DASGUPTA: Well, legislature is
23 entitled to a presumption of regularity. And again,
24 there is the statement in the sponsor's memo in
25 support. But a further problem would be the question

1 of what the entitlement would be. I mean, in order
2 to determine that there is a legal entitlement to a
3 retrospective salary adjustment, an entitlement has
4 to be shown. And plaintiffs' damages claim lacks a
5 legal nexus to the constitutional violation
6 identified in Maron.

7 JUDGE FAHEY: But you see the distinction
8 between people who are still on the payroll and
9 people who have retired. If you're retired, you've
10 been damaged, you've lost income that can't be
11 replaced, and it's affected not only your income now,
12 but that twelve years that you lost from 2009 to
13 2012, it's affected the size of your pension. So if
14 a seventy percent pay reduction also amounts, in
15 essence, to maybe a twenty-five percent reduction in
16 the value of your pension. And because of the timing
17 of it, it can't be corrected by the solution that's
18 offered here. So everyone else has an arguable
19 remedy except for the retired judges.

20 MS. DASGUPTA: Well, there are couple of points
21 there. I mean, first that presumes that the violation was
22 a violation of pay. And this court, in Maron, expressly
23 found that was not so. There were claims there pressed
24 that the judiciary had an entitlement to salary increases
25 during that period, and - - -

1 JUDGE FAHEY: Well, this is post-Marón now;
2 I'm saying post-Marón. You've decided there is - - -
3 there is - - - there have been - - - there is a
4 violation, and there is damages.

5 MS. DASGUPTA: But in order for - - -

6 JUDGE RIVERA: But you're saying the
7 violation is you should have considered it
8 appropriately and you didn't; not that you should
9 have then, having gone through that exercise, decided
10 yes, we're going to give judicial raises; is that
11 what you're arguing?

12 MS. DASGUPTA: That's - - - that's exactly
13 right, Your Honor. Because what Marón found was - -
14 - Marón found that the legislature had applied a
15 constitutionally inappropriate process. It did not
16 find that judicial salaries needed to be adjusted by
17 any particular amount prospectively or
18 retrospectively, but that's what plaintiffs' remedy
19 requires. You can't order damages or back pay remedy
20 unless there was an entitlement to that money.

21 And first of all, the claim for legal
22 relief going back to 2000 doesn't even have a
23 connection with the violations that this court found
24 in Marón. In Marón, this court file - - - identified
25 several violations between 2006 and 2008, where the

1 legislature considered judicial pay but didn't enact
2 a raise because of impermissible political
3 considerations. The judiciary budget didn't even
4 request a raise for the first time until 2005. So -
5 - -

6 JUDGE RIVERA: But they argue that even if
7 they are not entitled to a set amount of money, they
8 are entitled to that process. And they argue that
9 there is nothing to suggest that that process has
10 occurred.

11 MS. DASGUPTA: Well, that process occurred
12 when the legislature convened when it considered this
13 court's decision in Maron, and considered this
14 court's direction, and it - - -

15 JUDGE RIVERA: But that's getting me back
16 to my question about what you've pointed to is
17 awareness, but not the actual compl - - - not the
18 actual exercise of a correct process.

19 MS. DASGUPTA: Well, awareness and a
20 decision, Your Honor. I mean, the legislature didn't
21 have to create a full administrative type record of
22 what it decided not to do; it was sufficient that it
23 signaled to this court that it was aware of this
24 court's decisions, it was aware of this court's
25 guidance, of the claims for relief.

1 JUDGE ABDUS-SALAAM: Does the legislature
2 ever do that? Does the legislature ever create a
3 record of what it decided not to do?

4 MS. DASGUPTA: No, that - - - sometimes
5 there are legislative debates, but here, this
6 legislation was enacted expeditiously because that's
7 exactly what this court directed; this court directed
8 them to act expeditiously.

9 And as to legislative silence, plaintiffs
10 make much of the fact that the legislature didn't
11 specifically speak any magic words like, we are
12 considering retroactive pay adjustments and deciding
13 not to provide those, but the legislature doesn't
14 have to speak those magic words. The case that
15 plaintiffs cite in their brief, for - - - the - - -
16 the Larabee plaintiffs, for the proposition that
17 nothing can be offered - - - inferred from
18 legislative silence, that quote misses off the top of
19 the court's statement.

20 The court says before that that in fact
21 legislative silence can be significant. In that
22 particular case, the court determined that nothing
23 could be inferred because the inferences would have
24 been conflicting. But - - -

25 JUDGE PIGOTT: So is your - - - is your

1 argument that, yes, the legislature considered the
2 past; yes, they decided not to give them any money;
3 and yes, they decided that they are not entitled to
4 any emolument in their pensions, those that have
5 retired?

6 MS. DASGUPTA: Yes, Your Honor.

7 JUDGE PIGOTT: And where do we find that?

8 MS. DASGUPTA: Where in the legislature's
9 determination? There is the - - -

10 JUDGE PIGOTT: Where - - - where in the
11 world, almost.

12 MS. DASGUPTA: Right. Well, there is - - -

13 JUDGE PIGOTT: I mean, I understand you're
14 saying that they don't - - - you know, as Judge
15 Abdus-Salaam is suggesting, they don't always report
16 when they don't do something. But they - - - I think
17 they understood Maron, and they did something.

18 MS. DASGUPTA: Uh-huh.

19 JUDGE PIGOTT: And the something they did
20 did not include those two things. I can't imagine
21 holding a hearing to find out what the legislature
22 did, but how do we - - - how do we know, you know - -
23 - you make, you know, cogent arguments, but how to
24 we know those are the ones that we should apply?

25 MS. DASGUPTA: That's enough. That's

1 enough. That the legislature showed that it took
2 seriously this court's decision in Maron and followed
3 the guidance to the letter. And it - - - given the -
4 - -

5 JUDGE PIGOTT: Well, let's assume for a
6 minute that we found that the death penalty was
7 unconstitutional. And there is four people on death
8 row; you know, now that it's unconstitutional, we
9 can't sentence anybody to death anymore, but we can
10 kill these four because they were - - - you know,
11 they were found guilty before it was found
12 unconstitutional. I would think that some people
13 might get upset by that.

14 MS. DASGUPTA: Well, under there, there
15 would be all sorts of procedural things that might
16 happen - - -

17 JUDGE PIGOTT: That's what we are looking
18 for here.

19 MS. DASGUPTA: - - - and there would be
20 question about retroactivity, there would be
21 individual remedies in here. The plaintiffs are - -
22 - you know, of course it's the province of this court
23 to determine whether the legislature complied. And
24 that's why Supreme Court granted the motion for
25 renewal. Because Supreme Court determined, yes, it

1 was important for the courts to have the opportunity
2 to determine whether the legislature complied.

3 But Supreme Court and the First Department
4 found that the legislature did comply. And of
5 course, the court is now revisiting that question,
6 but there's nothing in the guidance that the court
7 gave to the legislature that would state otherwise.
8 The court was very careful to craft a remedy that, as
9 it described, struck the appropriate balance between
10 preserving the independence of the judiciary and
11 avoiding encroachment on the budget-making authority
12 of the legislature.

13 And it's - - - and Maron wasn't unusual in
14 declining to tell the legislature what to spend. In
15 Campaign for Fiscal Equality, this court recognized
16 and applied those same principles when setting aside
17 a lower court's order of monetary relief. That was a
18 very similar case, in some ways, to this case,
19 because it involved a circumstance where this court -
20 - -

21 JUDGE RIVERA: But given the nature of the
22 harm, can you not spend at all - - - at all? Because
23 that's what you're arguing.

24 MS. DASGUPTA: The nature of the harm was
25 the separation of powers.

1 JUDGE RIVERA: For the retirees; let me - -
2 - let me just change this a little, but for the
3 retirees, as per Judge Fahey's point.

4 MS. DASGUPTA: But the harm that this court
5 found in Maron was not harm to individuals.

6 JUDGE RIVERA: Uh-huh.

7 MS. DASGUPTA: Individuals, as a result of
8 the legislature's impermissible consideration, may
9 not have received raises that the legislature may
10 have provided. That's in some sense speculative, and
11 it's also speculative how much the legislature would
12 have provided if the legislature had considered
13 judicial salary on the merits. Would it have
14 provided cost of living adjustments for every year
15 from 2000 to 2010?

16 JUDGE RIVERA: So if we disagree with you -
17 - - agree with you that there's not a set amount of
18 damages that the legislature - - - that the judiciary
19 can require or order in this particular case, is the
20 most - - - but we otherwise agree with them - - - is
21 the most that this court can do - - - is this what
22 you're saying - - - the most that this court can do
23 is tell the legislature, you've got to make explicit
24 that you have addressed the procedural harms set out
25 in Maron?

1 MS. DASGUPTA: The court could do that if
2 it had concerns, but it really shouldn't have
3 concerns here because the legislature was pretty much
4 as explicit as the legislature gets, barring any
5 extensive debates. And this was not, of course, the
6 first judicial salary proposal to come before the
7 legislature during those years, or even a first
8 proposal for a judicial pay commission. And in the
9 debate surrounding the legislation that didn't pass,
10 in 2006, 2007, the legislature did debate the issue
11 of retroactivity. So the legislature was very much
12 aware of this issue. And it's not just - - -

13 JUDGE PIGOTT: Let me ask it the other way,
14 could they - - - could the legislature, if it wanted
15 to, give retroactive pay to the petitioners here and
16 the retirees?

17 MS. DASGUPTA: The judici - - - the
18 legislature might be able to make an appropriation or
19 craft some scheme, but it would require an
20 appropriation, because the Constitution doesn't - - -

21 JUDGE PIGOTT: Right. So if we - - - and I
22 understand your argument with respect to Maron. So
23 if - - - if we're not satisfied or if it's difficult
24 to determine whether that was even considered, would
25 a Maron-type opinion that says you should consider

1 this - - - you can say no, you can say, hey, you
2 know, we're not giving them a nickel, or you could
3 say, we'll take care of the retirees, or you could
4 say, we'll take care of everybody, or any - - -
5 anything in between; would that be inappropriate, in
6 your view?

7 MS. DASGUPTA: Well, in part, because there
8 would have to be some trigger for court's concern.
9 And here, there is no basis for supposing that the
10 legislature didn't consider it, but also, the trigger
11 would have to be - - -

12 JUDGE PIGOTT: We're back to that silence
13 thing, I guess.

14 MS. DASGUPTA: Well, but the trigger would
15 also have to be the idea that there was some
16 entitlement that was missed out on. So there is the
17 problem with the calculation of damages, and the
18 problem with the period of time, but there's also the
19 problem of the lack of symmetry between the violation
20 alleged or the violation found in Maron, and the
21 relief that's requested here.

22 So for damages, damages, it should be
23 clear, are completely off the table because of
24 sovereign immunity. I know that the plaintiffs have
25 suggested that the court can't consider sovereign

1 immunity at this juncture, but this court has
2 recognized in many cases that sovereign immunity is
3 jurisdictional; it can be considered at any stage of
4 the proceeding, including sua sponte by the court.

5 And the court has recognized, for example
6 in the Brown case that we cite at page 25 of our
7 brief, that the state is immune unless it waives its
8 sovereign immunity, and that sovereign immunity is a
9 creature of statute. And it has also recognized in
10 the Benz v. New York Thruway Authority case, 1961,
11 that this consent that's provided has to cover, not
12 just who plaintiffs seek to sue, but what they are
13 seeking. So - - -

14 JUDGE PIGOTT: Well, you're suggesting that
15 if the legislature tomorrow said, you know, we're not
16 paying judges anymore, and you can't touch this
17 because we've got sovereign immunity - - - you would
18 agree that that's wholly inappropriate. I mean, the
19 legislature does not have that type of sovereign
20 immunity to do that to their judges.

21 MS. DASGUPTA: That would be a different
22 case, Your Honor, because with not paying judges,
23 that would trigger the constitutional concerns set
24 forth in the compensation clause. So one of the
25 things that's very different from this case, you

1 know, this - - - it's kind of bound up at both - - -
2 addresses the lack of availability of money damages
3 in matter of law, but it also goes to the lack of
4 legal nexus.

5 It's the idea that the violation that took
6 place here wasn't a violation that affirmatively
7 required any sum of money to be paid. So a situation
8 that Your Honor is positing, where the legislature
9 just refuses to pay judges, or, for example, let's
10 say the legislature decides to just trim judicial
11 salaries by 10,000 dollars, that would also be a
12 compensation clause violation; that would be a
13 diminishment violation. In that situation - - -

14 JUDGE PIGOTT: I was using that only as an
15 example, but what I'm - - -

16 MS. DASGUPTA: Well, the money there - - -
17 in that situation, Your Honor, the money is the way
18 to remedy the constitutional violation. So this
19 court could absolutely, under those circumstances,
20 say that money was required to remedy the violation.
21 Now, the question is how it would do it, it would
22 probably be sufficient to go with a declaratory or
23 injunctive relief.

24 And this is why a sovereign immunity wasn't
25 a problem in the previous stages of the case.

1 Because all of the plaintiffs who were pressing
2 claims for retroactive relief were asking for it in
3 the form of an injunction, asking for their salaries
4 to be adjusted, or ordering the legislature to
5 consider something particularly. But to ask for a
6 liquidated sum of money damages, 312 million dollars,
7 that certainly implicates sovereign immunity. And -
8 - -

9 JUDGE PIGOTT: Are you just arguing - - - I
10 mean, if they said, all right, we won't call it
11 liquidated damages, we'll give you the names, we will
12 give you the dates they were hired, the dates that
13 they left, and each emolument they've had in the
14 course of their career, would that - - - would that
15 take care of that for you?

16 MS. DASGUPTA: That runs into the same
17 problem that an entitlement is still lacking; that -
18 - - that in order for this court to order some sort
19 of retrospective adjustment, it has to know that
20 there was an economic harm that was definable, that
21 there was something that, in the counterfactual, the
22 plaintiffs definitely would have gotten that they
23 didn't get.

24 And Judge Fahey had asked earlier, had
25 expressed the concern about this idea that if a

1 constitutional violation occurred and there is a
2 category of person that is outside the remedy
3 provided by the legislature, what then? And it's not
4 unusual that money damages might not be available
5 even for a constitutional violation. I mean, this
6 court recognized in the Brown case, when it set out
7 the test for determining when money damages should be
8 appropriate, that there are a number of factors that
9 have to be met.

10 So even when a constitutional violation of
11 a self-executing provision has been found, and even
12 when there is an applicable waiver of sovereign
13 immunity, this court has recognized that if those
14 factors are not met, then an award of money damages
15 will not be appropriate. And none of those factors
16 are present here.

17 The key factor that Brown focused on was
18 the need for a deterrent. And here, we're not going
19 to have future violations because of the creation of
20 the judicial pay commission. Brown also identified
21 the need for an analogous common law duty, or an
22 analogous Bivens remedy, or something that shows some
23 symmetry between the violation - - -

24 JUDGE FAHEY: The thing about that, though

25 - - -

1 MS. DASGUPTA: - - - and the harm.

2 JUDGE FAHEY: The thing about that is, you
3 have this class of people and there's been a
4 constitutional violation against this entire class of
5 people. And - - - so because of their - - - because
6 of their status as to when they left the payroll,
7 they're carved out of any remedy, it doesn't seem to
8 make any sense, there doesn't seem to be any rational
9 basis for making that distinction.

10 MS. DASGUPTA: But I think the key there,
11 Your Honor, is that in Maron, the court was presented
12 with claims of harm to the judiciary as individuals
13 under the compensation clause - - -

14 JUDGE FAHEY: Uh-huh.

15 MS. DASGUPTA: - - - and to the judicial
16 branch, as an institution and coequal branch of
17 government under the separation of powers clause.
18 And it rejected any notion that there was a
19 constitutional entitlement to particular salary
20 adjustments. But it found a violation that could
21 only be remedied through this structural remedy,
22 which the legislature has now provided.

23 JUDGE PIGOTT: Thank you, Ms. Dasgupta,
24 your light is on.

25 MS. DASGUPTA: Thank you.

1 JUDGE PIGOTT: Thank you for your time.

2 MS. DASGUPTA: Mr. Bezanson, not to put any
3 pressure on you, but the Honorable Howard Levine is
4 here too; we have two of our former stars of the - -
5 - Judge Levine, welcome, sir.

6 MR. BEZANSON: Welcome.

7 JUDGE PIGOTT: It's always a pleasure.

8 MR. BEZANSON: First, I'd like to point out
9 that the defendants conceded the point of sovereign
10 immunity very early on in this case in Justice
11 Lehner's opinion in 2008, 19 Misc.3d at 239. He
12 notes that the parties agreed the defendants are the
13 proper parties, and this court noted that as well in
14 2010, at 14 NY3d at 246. And this is well after
15 we've made clear what our damage claims were, which
16 were articulated in some detail with our motion for
17 summary judgement in April of 2008.

18 Now, just before I go a step further, Judge
19 Garcia, the record I was looking for earlier on, other
20 judge - - - other employees pay, is - - - the record is
21 260 to 268.

22 Now, for the first time in this appeal, the
23 defendants are saying that the damage period should be
24 limited to 2006 to 2009; they've never argued that before.
25 This is something that Justice Freedman took up on her

1 own. And with all apologies to her, she was mistaken.
2 That time period related only to the Maron claim, which
3 was a statutory claim based upon funds that had been
4 budgeted, but not appropriated. And an example was given
5 that at that time period, the funds were not appropriated
6 because there was a dispute about campaign finance reform.
7 But it's unmistakably clear that the period of violation
8 in this case did not begin in 2006.

9 The Appellate Division in their 2009 opinion
10 said, for example, the court - - - referring to Justice
11 Lehner, the trial court - - - found that the only reason
12 why there had been no adjustment in judicial compensation
13 during the past decade was the legislature's insistence on
14 linking any judicial pay increase to a simultaneous
15 legislative pay increase.

16 And that ten-year period has been with this case
17 in every court, from the beginning right up through - - -

18 JUDGE PIGOTT: But aren't we - - - aren't
19 we still stuck with the dilemma that - - - I thought
20 we were fairly clear in Maron that we can't tell a
21 legislature what to do. All we could say is, you're
22 - - - you violated the constitution, fix it; they
23 said, we fixed it, end of story. And which leads me
24 to my second question which is, if we say, okay, you
25 know, you told us we got to consider this, we've now

1 considered it; not a dime.

2 MR. BEZANSON: Your Honor, this is
3 precisely why, in the Larabee case, we have
4 studiously avoided asking this court to require the
5 legislature to do anything, following the Klostermann
6 case. What we are asking court to do now is not to
7 ask the legislature to anything except what any
8 defendant does when they are found to have violated a
9 constitution and caused financial harm. And that is
10 they, like any other defendant, can pay damages for
11 it. They don't have to pass any legislation - - -

12 JUDGE PIGOTT: But you want a - - - you
13 want a judgment to the tune of the amount you said,
14 and then you're going to execute on the state of New
15 York - - -

16 MR. BEZANSON: That's right, it's a
17 judicial function, it's a judicial decision to make,
18 and it's one that would be utterly appropriate in
19 this case. And I just note, as an aside, that we are
20 not asking the state to budget anything; they already
21 have a 1.9-billion-dollar reserve for moments just as
22 this, and we're not asking for any nearly that
23 amount; maybe we should.

24 And I'd also like to point out that we are not
25 asking this court or anyone else to speculate about what

1 the legislature might have done or could have done at any
2 given time. We're just asking this court to look at the
3 damages that were caused, actual loss of value to the
4 1,797 judges. And it's a - - - really a very simple
5 matter. You just take the consumer price index, multiply
6 it by the salary they had, and add it up over the ten
7 years, as accounting firm EisnerAmper did for us on a pro-
8 bono basis, and it comes out to 286 million dollars; they
9 add that nine percent, it's 312 million.

10 Let's see; counsel at opposite also pointed out
11 that the legislature acted expeditiously; actually it took
12 them ten months to get around to doing anything after this
13 court's ruling - - -

14 JUDGE PIGOTT: Well, you got to measure
15 what expeditious may mean in the context.

16 MR. BEZANSON: Maybe that's expeditious, I
17 don't know.

18 Also she mentioned that in - - - economic
19 times are hard, maybe that - - - maybe that's why the
20 legislature didn't do anything; we don't have to
21 speculate about that because even in the teeth of the
22 depression in this country, nobody got away from
23 paying damages because there was a depression.
24 Financial hardship is never an excuse for defaulting
25 on your obligation as a defendant.

1 JUDGE GARCIA: But isn't that more to the
2 argument that we were talking about earlier, the
3 point that it's very hard to speculate what they
4 would have done during that time?

5 MR. BEZANSON: Your Honor, the beauty of
6 this case is we don't have to speculate about
7 anything. All we have to do is look at what we know
8 they did. And what we know they did - - -

9 JUDGE GARCIA: Aren't we crafting a remedy?

10 MR. BEZANSON: - - - is violate the
11 Constitution and cause - - - I'm sorry?

12 JUDGE GARCIA: We are crafting a remedy
13 which we specific declined to do last time.

14 MR. BEZANSON: You declined to do it last
15 time because, in the generous heart of this court,
16 you thought maybe the legislature will make this
17 right. Well, they made it half right, not whole
18 right. And as this court said, in page 243 of its
19 opinion, the province of this court is to assess
20 whether or not the legislature in this state met its
21 constitutional obligations.

22 And that's what I am asking this court to
23 do now, to redress the harm that's been done.
24 Otherwise, we have a violation that goes without
25 consequences to the violator, and we have a financial

1 harm that goes without remedy to those who lost.

2 JUDGE PIGOTT: Thank you, Mr. Bezanson.

3 MR. BEZANSON: Thank you.

4 JUDGE PIGOTT: Judge.

5 MR. BEZANSON: I'll give it over to you.

6 HON. SILVERMAN: Well, I just wanted to
7 just add a point. It seems to me that this court did
8 retain jurisdiction of what was appropriate
9 legislative action. So it seems to me that is
10 basically the law of the case; I don't think that
11 it's an issue as to whether or not this court can
12 review what the legislature did. I think the court
13 specifically said it could, and if necessary, it
14 would.

15 So I would suggest to this court that the
16 legislature has not acted appropriately pursuant to
17 the guidelines laid down in the Maron court, and
18 that, as some of you have pointed out, it does leave
19 justices such as I without any remedy at all.

20 I retired in 2008, what was done by the
21 commission has absolutely no effect on me; I worked
22 for twenty-four years as a judge in the New York
23 court system, for ten of those years I served at the
24 same salary.

25 I think that under the circumstances that

1 judges such as myself are entitled to some sort of
2 consideration, and I don't believe - - - it's clear
3 to me that the legislature hasn't given them any
4 consideration. In fact, as the - - - as the
5 legislation that was passed indicates, it's just
6 future judges and in fact a raise was recommended;
7 that took effect in 2012.

8 And I'd like to point out that this statute that
9 created the commission does not give the commission the
10 right to set raises; it's merely they can recommend
11 raises, and then it's up to the legislature to determine
12 whether or not they will let those raises go through. So
13 I don't see this commission as the ultimate cure all to
14 all the problems that were considered in the issues raised
15 over the prior ten or twelve years, since this case has
16 taken that long to get its way back up here.

17 I do think Justice Freedman, in her decision,
18 recognizes something that I think the assistant solicitor
19 general chooses to ignore. I mean, this is sort of like
20 the old case where a guy, you know, kills his parents and
21 asks for mercy because he's an orphan. I mean, the reason
22 that you can't exactly determine the damages is because
23 the legislature acted unconstitutionally.

24 So it doesn't seem to me the appropriate remedy
25 is to reward them for the fact that they acted

1 unconstitutionally by saying, well, you acted
2 unconstitutionally, you didn't give us any guidelines, so
3 now we can't do anything.

4 So in my judgment, the appropriate remedy, it
5 could be as suggested by Mr. Bezanson, as Judge Freedman
6 said, she would remand this action the Supreme Court to
7 determine compensatory damages for the constitutional
8 violations that the Court of Appeals identified from 2006
9 onward.

10 And under those circumstances, I think Justice
11 Freedman has the better of it, I think her argument is
12 correct, and I would ask this court, with respect to my
13 case, to reverse the decision of the Supreme Court, which
14 dismissed my complaint, which was affirmed by the
15 Appellate Division, and I would ask this court to find
16 that the action taken by the legislature did not adhere to
17 the guidelines set forth in the Maron decision, which
18 spoke of appropriate legislation, and I don't know that I
19 need quote it to Your Honors, but it does say - - - state,
20 and I quote, "Whether the legislature has met its
21 constitutional obligations in that regard is within the
22 province of this court."

23 And as I say, that is the law of the case, I
24 think you have the authority and the obligation to review
25 what was done. And I do feel that the action taken was

1 inappropriate, was inconsistent with the reasoning of this
2 court's opinion, and under the circumstances, I feel the
3 judgment of the Appellate Division should be reversed.

4 Thank you very much.

5 JUDGE PIGOTT: Thank you, Your Honor.

6 Thank you all.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Larabee v. Governor of the State of New York, No. 52, and Silverman v. Silver, No. 53, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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