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

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

Plaintiffs,

- against -

SHELDON SILVER, in his official capacity as Speaker of the New York State Assembly, THE NEW YORK STATE ASSEMBLY, JOSEPH L. BRUNO, in his official capacity as Temporary President of the New York State Senate, THE NEW YORK STATE SENATE, DAVID A. PATERSON, in his official capacity as Governor of the State of New York, and THE STATE OF NEW YORK,

Defendants.

SUMMONS

Index No.

TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned and required to serve upon plaintiffs' attorneys an answer to the complaint in this action within 20 days of service of this summons on you, exclusive of the date of service, or within 30 days after service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis for the designated venue is the county in which plaintiff Chief Judge Judith S. Kaye resides.

Dated: New York, New York
April 10, 2008

Of Counsel:

Bernard W. Nussbaum
Marc Wolinsky
George T. Conway III
Graham W. Meli
Kevin S. Schwartz

WACHTELL, LIPTON, ROSEN & KATZ

By: _____
Bernard W. Nussbaum
A Member of the Firm

51 West 52nd Street
New York, New York 10019
Telephone: (212) 403-1000

MICHAEL COLODNER, ESQ.
NEW YORK STATE OFFICE OF COURT ADMINISTRATION
25 Beaver Street, 11th Floor
New York, New York 10004
Telephone: (212) 428-2150

Attorneys for Plaintiffs

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Defendants.

COMPLAINT

Index No.

Plaintiffs, Chief Judge Judith S. Kaye and the New York State Unified Court System, by their undersigned attorneys, allege for their complaint as follows:

Introduction

1. In the last 14 years, New York State-paid judges, unlike virtually every other New York State employee, have received only one increase in pay, and that increase came almost ten years ago, in January 1999. Today, no other state or federal judges anywhere in the United States have gone longer without an increase in their compensation — not even a cost-of-living adjustment. State judges in all 49 of the other states, as well as all federal judges, have received salary increases since 1999 — and many have received increases more than once. In fact, while New York judicial salaries have *declined* 27 percent in real terms since 1999, state judges everywhere else in the Nation, and virtually every other New York State nonjudicial

employee, have received, on average, cumulative increases of more than 24 percent, ensuring that they would not fall behind the cost of living.

2. In 1999, State Supreme Court Justices' salaries were on par with those of United States District Judges. Today, because federal judges have received salary adjustments and New York judges have not, State Supreme Court Justices receive over $30,000 *less* than their federal counterparts, and judges of the State's other major trial courts lag even further behind, with some receiving over $60,000 less. And according to the Chief Justice of the United States, even that substantially greater pay received by federal judges today is inadequate — so inadequate that it has created a "constitutional crisis that threatens to undermine the strength and independence of the federal judiciary." CHIEF JUSTICE OF THE UNITED STATES JOHN G. ROBERTS, JR., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (Jan. 1, 2007). As recently as March 13, 2008, Associate Justice Anthony Kennedy made the same point to a congressional committee. He said: "We are at a crisis" over judicial pay; "we are losing our best judges; we can't attract them; we can't retain them"; it is a "constitutional duty" to maintain the general excellence of the judiciary. *See* Tony Mauro, *Justice Kennedy Turns Up the Heat on Judicial Salaries*, LEGAL TIMES, Mar. 14, 2008.

3. According to a recent 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. NAT'L CTR. FOR STATE COURTS, JUDICIAL COMPENSATION IN NEW YORK: A NATIONAL PERSPECTIVE 9 (May 2007) [hereinafter NCSC REPORT]. Since the report was issued, one of the two states that ranked behind New York — Oregon — increased its judicial salaries. And so now New York ranks 49th. But even that statistic does not tell the full tale. For many of the State's judges live in and around New York City — where the cost of living is higher than the statewide average.

4. Today, owing to the near-decade-long pay freeze that they have endured, New York State's judges — whom the public has every right to expect should be among the most capable and most experienced members of the bar — face the demeaning situation in which they can expect to earn less than first-year associates at many of the State's law firms and significantly less than attorneys of comparable experience. They can expect to earn less than they could in private practice and less than many other officials and employees in State and local government, including counsel to New York State municipalities and agencies, and deans of the State's public law schools — many of whom have received substantial pay increases in recent years. In some cases, New York State judges can even expect to earn less than *non*judicial personnel who work in the courtrooms in which the judges preside.

5. As their salaries have eroded, New York's judges have been asked to bear staggering caseloads. In 2006, over 4.5 million cases were filed in the New York State courts, nearly *triple* the number of filings for the entire federal judiciary. *See* NCSC REPORT at 5. Since the last judicial pay increase in January 1999, civil filings in New York have increased 35 percent, and all filings in the State have increased 15 percent. The total number of New York judges has not come close to keeping pace, increasing by only about 1 percent during the same period.

6. The last three Governors and many members of the Legislature have publicly admitted that a judicial pay increase is necessary. There is not even a dispute as to the size of the increase required: everyone agrees that Justices of the New York Supreme Court should once again be paid on par with federal judges, with whom they traditionally enjoyed parity. Likewise, all agree that our State's appellate judges and other State-paid trial judges sorely are in need of appropriate pay adjustments. Further, all have agreed to specific new salary levels for these judges, as reflected in the legislative proposals which the Chief Judge has submitted to them. *See* ¶¶ 39-40.

7. Despite this widespread consensus, the political branches have refused to take the necessary action. Judicial pay increases have instead been held hostage to unrelated political initiatives. Legislators, for example, have refused to approve judicial pay increases unless their own salaries are increased at the same time, and the Executive has refused to agree to legislative raises unless legislators agree to an oft-changing raft of initiatives reported to include campaign finance reform, charter schools, education tax credits, congestion pricing, budget policy, racing and wagering, and other initiatives wholly unrelated to judicial compensation.

8. Recognizing the need for increased judicial salaries, the Governor and the Legislature in 2006 even approved a budget that included $69.5 million for judicial salary increases. L.2006, c.51, § 2. But the law adopting the budget specifically stated that further legislation would be necessary before these increases would be paid. *Id.* Despite including this amount in the 2006 budget, the Legislature refused to adopt further legislation necessary to implement judicial pay increases because the Legislature and the Governor could not agree on legislative pay increases.

9. Yesterday, in a repetition of this conduct, the Legislature and Governor Paterson approved a 2008 budget that mentions funds for judicial salary increases, known as a "dry appropriation." But, again, such increases are subject to the passage of further legislation. And, again, despite urgent pleas by the Chief Judge, the Governor and the Legislature refuse to provide funds and adopt legislation required to implement necessary judicial pay increases. Thus, judicial salaries in 2008, as in 2006, remain exactly as they have been for the last decade. But, as reported by *The New York Times* this morning, the Legislature did find funds — $350 million in funds for each chamber — "derided by critics as pork— to dole out for capital projects across the state. And lawmakers perpetuated their widely criticized practice of handing out state money for various projects in their districts." Jeremy W. Peters, *Legislators Back Spending Rise in State's Budget*, N.Y. TIMES, Apr. 10, 2008 at A1, B4.

10. The conduct of the executive and legislative branches has had a discriminatory impact on the Judiciary, which cannot defend itself. While continuing to hold judicial salaries hostage, the Legislature and the Executive have approved over the last decade regular increases in the salaries of approximately 195,000 other public employees — larger and more politically powerful constituencies — many of whom are paid pursuant to State-approved collective bargaining agreements and salary schedules that provide for automatic annual raises. These raises for nonjudicial State employees have, as indicated, aggregated at least 24 percent over the nine years in which judicial salaries have remained frozen. *See* NCSC REPORT at 10.

11. The situation has become untenable. The NCSC report contained these comments, among others, from New York judges it surveyed:

- "I find what has happened to judges in this State personally demoralizing, but more importantly, it is demeaning and disrespectful toward the institution. In theory, we're an independent, coequal branch of government. In practice, we're not. Enough is enough. I still love my job, but I've put the regrets behind me and I'm searching for new opportunities with law firms."

- "Recently my spouse and I have had to take careful stock of our finances. We are heavily in debt in order to pay the cost of our daughter's college education and simply to meet our expenses. . . . I am now forced to give serious and immediate consideration to resigning from the bench in order to return to the private sector. It pains me greatly to consider this alternative, but it has become more painful to see the effect of my government service on my own family."

- "I've thought about retiring and going back to the practice of law, and quite honestly, if the raises aren't forthcoming I will have no alternative. I cannot fathom telling my daughters that their father can't pay for their wedding because 'I'm just a Supreme Court Justice.'"

- "We can tell you a number of things about the effect the salary freeze has had on us as a family. We've both recently taken out pension loans for the purpose of paying down debt. Since expenses have risen so high and our salary has not, credit debt alone has become crushing. . . . The raise, therefore, is absolutely imperative for us. We may have to sell our house soon if we don't get a raise."

- "The most galling thing about all of this is that I could end these [financial] problems by simply resigning my judgeship and re-entering the private sector.

> Barring some change in our compensation, I intend to do this next year. . . . I doubt very much whether many attorneys with the same or superior qualifications to mine will be available to take my place."

NCSC REPORT at 13-15. As one Supreme Court Justice wrote in a resignation letter to then-Governor Spitzer on December 30, "I am unwilling to further deplete my savings and reduce my lifestyle to continue in office," and "I believe a number of other judges have retired prematurely because of this sorry situation." *See* Daniel Wise, *Citing Economic Hardship, Upstate Judge Plans to Quit*, N.Y.L.J., Jan. 9, 2008, at 1.

12. This situation is not only untenable and disgraceful, it is unconstitutional. The New York State Constitution embraces the principle of separation of powers. It establishes the Judiciary as an independent, co-equal branch of government ostensibly insulated from the political dynamics of the executive and legislative branches. But the Judiciary — which does not have a seat at the table when judicial compensation is set — cannot long remain an independent and co-equal branch of government, made up of judges of the caliber that the People of the State of New York deserve, if judicial compensation is permitted to decline by virtue of inflation as the Judiciary indefinitely is held hostage to unrelated political concerns and the economic self-interest of the other branches of government.

13. As the highest court of a sister State has expressed, "'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.'" *Goodheart* v. *Casey*, 555 A.2d 1210, 1212 (Pa. 1989) (quoting *Glancey* v. *Casey*, 288 A.2d 812, 816 (Pa. 1972)). The court also set forth the meaning of adequacy:

> "Adequate" means sufficient for a specific purpose. In this case, it necessarily means sufficient to provide judges with a level of remuneration proportionate to their learning, experience, and elevated position they occupy in our modern society. Inherent in this definition is the increasingly costly obligations of judges

> to their spouses and families, to the rearing and education of their children and to the expectation of a decent, dignified life upon departure from the bench.

Id. at 1212 (citation omitted). Finally, the court made clear the right and responsibility of the Judiciary to compel the payment of adequate compensation:

> Although the legislative branch of our government has the power and authority to set the salary scale for the judiciary, as a co-equal branch of our tripartite form of government, the "[j]udiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities. . . ." *Commonwealth ex rel. Carroll* v. *Tate*, 442 Pa. at 52, 274 A.2d at 197 (emphasis in original). Therefore, it follows that this Court has the inherent power to ensure the proper functioning of the judiciary by ordering the executive branch of government to provide appropriate funding so that the people's right to an efficient and independent judiciary is upheld.

Id. (internal citation omitted); *see also Jorgensen* v. *Blagojevich*, 811 N.E.2d 652 (Ill. 2004).

14. New York's executive and legislative branches have not come close to fulfilling their constitutional duty to provide the Judiciary with adequate compensation. By linking judicial salaries to legislative salaries and other unrelated policies and political concerns, they have permitted judicial salaries to fall to levels that cannot be defended. In so doing, the Executive and the Legislature have abused their powers; they have violated the bedrock principle of the separation of powers which exalts the independence and equality of each branch; they threaten to seriously impair the functioning of the Judiciary as a separate, independent, co-equal branch of government; they have undermined a pillar of our form of government.

15. The political branches also have violated the Constitution's Judicial Compensation Clause, which commands that a judge's salary "shall not be diminished" during his or her term in office. N.Y. CONST. art. VI, § 25(a). This provision protects more than the nominal value of judicial salaries; it also prohibits diminutions in purchasing power that affect judges in a disproportionate manner. In *United States* v. *Hatter,* 532 U.S. 557 (2001), the Supreme Court declared unconstitutional a Social Security tax because it "effectively singled out

then-sitting judges for unfavorable treatment" as compared to virtually all other federal employees. *Id.* at 561; *see also id.* at 576-77. The judges of New York have been similarly singled out for unfavorable treatment, as compared to virtually all other State employees whose purchasing power has been protected. State legislators, who can and do earn outside income, are not in the same category as judges and other full-time State employees. There is no principled difference between this case and *Hatter*. The discriminatory treatment inflicted on the judges of this State over the last decade violates the Compensation Clause.

* * * *

16. It is with deep regret that the Chief Judge, on behalf of the Judiciary, must now, as a last resort, commence this action. For years, she and other judges, along with many concerned citizens of all political persuasions and the editorial boards of newspapers throughout the State, have spoken out repeatedly about the need for the Executive and the Legislature to fulfill their constitutional duties to maintain adequate judicial compensation. But her pleas to avert a constitutional crisis, her efforts to maintain interbranch comity, have led to no effective action. The political branches' flouting of the State's Constitution has reached an extreme, leaving the Chief Judge with no other option compatible with her constitutional duty to ensure the independence and effective operation of the Judiciary.

17. Accordingly, she asks this Court to conduct, on an expedited basis, a plenary trial so that she may offer this Court — and the public — proof of the defendants' ongoing violation of their duties under the Constitution of the State of New York, proof that shall include her testimony and testimony of the defendants themselves, whom she here challenges to defend their unconstitutional conduct. That proof will demonstrate each of the constitutional violations pleaded below.

18. And with such proof comes the duty of this Court to act. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5

U.S. (1 Cranch) 137, 177 (1803). When New York's Constitution, its fundamental law, has been violated, this Court has the power and obligation not only to say so, but also to order full relief. The exercise of that power under the Constitution is particularly appropriate when the other branches of government have unconstitutionally interfered with the independence of the judicial branch, which is the branch charged with interpreting and applying the Constitution. Accordingly, by this action, plaintiffs seek to remedy the constitutional wrong inflicted on the Judiciary by the Executive and the Legislature.

The Parties

19. Plaintiff Judith S. Kaye is the Chief Judge of the State of New York, Chief Judge of the Court of Appeals, and Chief Judicial Officer of plaintiff New York State Unified Court System ("UCS"). *See* N.Y. CONST. art. VI, § 28(a); JUDICIARY LAW § 210. The Constitution vests in the Chief Judge broad and independent powers to ensure the effective operation of the courts, including the powers to issue administrative orders and to establish standards and administrative policies of general applicability throughout the State. *See* N.Y. CONST. art. VI, § 28(a), (c); JUDICIARY LAW § 211. Chief Judge Kaye brings this action on behalf of the UCS and its component State-paid courts and judges.

20. Plaintiff UCS is the independent judicial branch of New York State government, co-equal with the executive and legislative branches that act on the State's behalf. UCS includes all New York State trial and appellate courts, as well as the judges and justices who sit on those courts. *See* N.Y. CONST. art. VI, § 1(a).

21. Defendants Sheldon Silver and Joseph L. Bruno are, respectively, the Speaker of the New York State Assembly and the Temporary President of the New York State Senate. Defendants Silver and Bruno chair the Rules Committees of their respective Houses. On behalf of their respective Houses and legislative conferences, such defendants convene and govern their Houses and determine the legislative agenda for the respective Houses' Rules Committees and

thus for the Houses themselves. On information and belief, bills generally do not reach the agenda or attain passage in either House without the support and direction of defendants Silver and Bruno, respectively.

22. Defendant David A. Paterson is the Governor of the State of New York, in whom the executive power of the State vests. N.Y. CONST. art. IV, § 1.

23. Defendants New York State Senate and New York State Assembly comprise the two Houses of the New York State Legislature, in which the legislative power of the State vests. N.Y. CONST. art. III, § 1. Although the Senate has responded to the Chief Judge's request to pass legislation providing for stand-alone judicial salary increases, legislation can be enacted into law only by the concurrence of both Houses in the same bill in the same legislative session. As such, both Houses are necessary parties to this action.

24. Defendant State of New York is the employer of plaintiff Chief Judge Kaye and all judges and justices of plaintiff UCS, other than town and village justices. *See* JUDICIARY LAW § 39. On behalf of the defendant State, the executive and legislative branches of government have established levels of judicial compensation, *see* JUDICIARY LAW art. 7-B, fixed the Judiciary budget, *see e.g.*, L. 2007, ch. 51, and appropriated funds to pay the expenses in the budget, including judicial compensation, *see id.*

Defendants' Constitutional Obligations

The Principle of Separation of Powers and the Independence of the Judiciary Require That Judicial Compensation Be Adequate and Not Be Linked to Unrelated Political Concerns and the Economic Self-Interest of the Other Branches of Government

25. The New York State Constitution establishes the Judiciary as an independent, co-equal branch of the State's government. *See generally* N.Y. CONST. art. VI. The courts of this State long have recognized that "[n]othing is more essential to free government than the

independence of its judges." *People ex rel. Burby* v. *Howland*, 155 N.Y. 270, 282 (1898). This independence requires that the needs of the judicial branch of government be treated separately, on the merits; that they may not be linked or held hostage to unrelated political concerns and the economic self-interest of the other branches of government. This is especially true since decisions regarding judicial compensation are made by the other branches.

26. Courts in New York and elsewhere have held that the payment of inadequate judicial salaries "violate[s] public policy and the constitutional principles of separation of powers." *Kelch* v. *Town Bd.*, 36 A.D.3d 1110, 1112 (3d Dep't 2007). Apart from threatening to reduce the ranks of the Judiciary and drain the collective corps of judicial experience and expertise, inadequate judicial salaries pose constitutional dangers, including most apparently that "qualified citizens would be discouraged from seeking judicial office" if judicial pay lags far behind comparable employment, thus imminently threatening to compromise the Judiciary's effectiveness and its constitutional status as a co-equal branch of government. *Id.* As the highest court of another state aptly observed, "Without adequate compensation, a competent judicial system is not possible." *Goodheart* v. *Casey*, 555 A.2d 1210, 1213 (Pa. 1989).

27. For judicial compensation to be constitutionally adequate, it must "provide judges with a level of remuneration proportionate to their learning, experience and 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." *Goodheart*, 555 A.2d at 1212.

28. New York courts have recognized, more generally, that the Judiciary's status as an independent and co-equal branch of government confers an inherent power to order the political branches to provide reasonable and necessary resources: "[W]hen legislative appropriations prove insufficient and legislative inaction obstructs the judiciary's ability to

function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the constitution." *New York County Lawyers' Ass'n* v. *New York*, 745 N.Y.S.2d 376, 388, 192 Misc. 2d 424, 436 (N.Y. Sup. Ct. N.Y. Co. 2002). The courts of other states have applied this principle directly to judicial salaries. For example, the Illinois Supreme Court has held that its "administrative authority over the judicial branch carries with it the corresponding authority to require production of the facilities, personnel and resources necessary to enable the judicial branch to perform its constitutional responsibilities," including payment of the judicial salaries required by law. *Jorgensen* v. *Blagojevich*, 811 N.E.2d 652, 667 (Ill. 2004).

The Compensation Clause Prohibits the Discriminatory Diminution of Judicial Compensation

29. Consistent with these general principles of judicial independence and separation of powers, the New York Constitution specifically protects judicial salaries against interference by the political branches of government. The Compensation Clause, found in Article VI, § 25(a), provides that a judge's compensation shall not be diminished during his or her term in office:

> The compensation of a judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a judge of the county court, a judge of the surrogate's court, a judge of the family court, a judge of a court for the city of New York . . . , a judge of the district court or of a retired judge or justice shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed.

New York's Compensation Clause closely parallels that of the United States Constitution, which provides that federal judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

30. To ensure the continuing adequacy of judicial compensation, the Framers understood that salary increases would be necessary from time to time to account for contingencies such as economic changes. THE FEDERALIST NO. 79. The Framers thus adopted a

constitutional design by which the executive and legislative branches have a duty to ensure that judicial compensation not become so "penurious and inadequate" as to impair the Judiciary's independence or its proper place in the separation of powers. *Id.*

31. In light of the purposes of the Compensation Clause, courts have held that it "offers protections that extend beyond a legislative effort directly to diminish a judge's pay, say, by ordering a lower salary." *United States* v. *Hatter*, 532 U.S. 557, 569 (2001). The Compensation Clause also prohibits indirect diminution in salaries if judges are treated in a discriminatory fashion. *See id.* at 576-77. In *Hatter*, as set forth above, the United States Supreme Court declared unconstitutional a Social Security tax because it "effectively singled out then-sitting judges for unfavorable treatment" as compared to other federal employees. *Id.* at 561. By freezing judicial salaries in the face of inflation — thereby effectively reducing them — but not the salaries of virtually all other State employees which have been increased to keep pace with inflation, the Legislature and the Executive here, too, have "effectively singled out then-sitting judges for unfavorable treatment." As in *Hatter*, they have diminished judicial compensation in a discriminatory fashion.

Defendants Have Violated Their Constitutional Obligations

32. New York State last adjusted the compensation of State-paid judges nearly a decade ago, on January 1, 1999. *See* L. 1998, ch. 630 (amending JUDICIARY LAW art. 7-B). In the last 20 years, the State has adjusted judicial pay only one other time. *See* L. 1993, ch. 60.

33. The State's judges have not received so much as a cost-of-living adjustment in the last nine years, even though inflation has aggregated approximately 27 percent over that period. *See* NCSC REPORT at 10. The real value of New York judges' salaries — their actual purchasing power — has thus diminished by at least that amount since they last received a salary adjustment.

34. New York's judicial pay freeze is the longest in the Nation. Every other state and federal judge has received at least one and in some instances several pay adjustments since 1999 to keep pace with economic reality. Since January 1, 1999, trial judges of the other 49 states have received annual pay increases averaging over 3.2 percent and cumulative increases averaging over 24 percent. NCSC REPORT at 10.

35. As a result, New York judges' salaries have fallen far behind their colleagues in other states. The NCSC found that New York ranked 48th out of the 50 states in judicial pay when adjusted for statewide cost of living; and since that report was issued, Oregon, a state that had lagged behind New York in that measure, increased its salaries, causing New York to fall to 49th. Even this woeful status, however, may not fully reflect the inadequacy of the compensation of many New York judges. 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 where the cost of living is higher than the statewide average.

36. New York judges also now earn far less than federal judges. In January 1999, a New York Supreme Court Justice earned the same as a United States District Judge. Since then, federal District Judges' salaries have increased by over 20 percent — to $169,300 — leaving State Supreme Court Justices more than $30,000 behind, and this gap may soon grow wider. Judges of other major trial courts upstate — including the County Court, which tries the most serious crimes, and the Family Court, which presides over matters affecting the lives and welfare of children — are even further behind.

37. This growing disparity between New York State judges and federal judges is even more egregious in light of the fact that, for most of the last century New York State judges earned significantly *more* than federal judges. For example, in 1909 a New York State Supreme Court Justice earned $17,000 a year, and a United States District Judge earned $6,000 a year. In 1935, in the midst of the Great Depression, a New York State Supreme Court Justice earned

$25,000 a year; a United States District Judge earned $10,000 a year. The amount earned by State Supreme Court Justices in 1909 and 1935, when adjusted for the changing value of the dollar, significantly exceeds what judges are paid today.

38. This radical diminution of New York State judicial compensation is not the result of any policy disagreement in the State about the importance of adequate judicial salaries or what specific changes are necessary to restore adequacy to the State's judicial pay regime. Virtually every top official in New York government has acknowledged that judicial salaries should be increased. Newspapers, bar associations, business leaders, and public interest groups have uniformly called for these judicial pay increases and have specifically supported the particular reform measures and adjustments which Chief Judge Kaye has proposed. *See* ¶ 39. Likewise, judicial leaders in other states have taken notice of New York's judicial pay crisis. On January 30, 2008, the nationwide Conference of Chief Justices adopted a resolution expressing its support for "[a]dequate compensation for all members of the state and territorial judiciaries" and "[t]he efforts of the Chief Judge of the New York Court of Appeals to resolve the compensation crisis."

39. Recognizing this dramatic erosion in the value of judicial salaries, Chief Judge Kaye submitted legislative proposals for introduction by the State Legislature beginning in its 2005 session and continuing into the present session. *See* OCA 2005-29, OCA 2006-73, OCA 2008-88; *see also* FY 2007-2008 Budget, N.Y.S. Unified Court System; FY 2008-2009 Budget, N.Y.S. Unified Court System. While these proposals differed in some respects, they uniformly called for pay parity between Justices of the New York State Supreme Court and federal District Judges and for the fixing of salaries of other State-paid trial court judges and of appellate judges at specified fractions of the salary of a Justice of the Supreme Court as follows:

- Each Judge of a County, Family or Surrogate's Court to earn 95% of a Supreme Court Justice's salary (unless such Judge already were paid at a greater fraction, in which event that greater fraction would be continued);

- Each Judge of the Civil Court or the Criminal Court of New York City, and each Judge of a District Court, to earn 93% of a Supreme Court Justice's salary;

- Each full-time Judge of a City Court outside New York City to earn 90% of a Supreme Court Justice's salary, and each part-time Judge of a City Court outside New York City to earn the same fraction of the lowest-paid full-time City Court Judge's salary as he or she theretofore was earning;

- Each Judge of the Court of Appeals and each Justice of the Appellate Division and of the Appellate Term to earn the same percentage of a Supreme Court Justice's salary as he or she theretofore was earning; and

- Judges having certain administrative responsibilities (such as administrative judges, chief judges of City Courts outside the City of New York, presidents of District Court Boards of Judges) would earn proportionately adjusted pay differentials.

40. The Chief Judge's legislative proposals also attracted the unequivocal support of the Senate, Assembly, and Governor at various times, albeit none of these proposals has secured the passage by both legislative Houses and approval of the Governor needed to become law. Instead, the Senate has approved variations of the Chief Judge's proposals twice (S. 5313, in April 2007; S. 6550, in December 2007); the Assembly has approved another variation once (A. 4306-B, in March 2007); and the Governor's predecessor offered his own variations in his respective 2007 and 2008 budget submissions (S. 2106 [2007]; S. 6806 [2008]). While none of these variations was identical in all respects, each faithfully included the same provision for pay parity between Justices of the Supreme Court and federal District Judges, and for pay adjustment of other trial and appellate court judges as the Chief Judge had proposed.

41. Despite the consensus on the merits of these specifically enumerated judicial pay increases, New York has repeatedly failed to do what every other jurisdiction in the Nation has done at least once in the last nine years. Attempts to implement judicial salary increases have repeatedly fallen victim to unrelated political issues among the State's politicians, who have repeatedly put their own interests ahead of their obligations to the Constitution and the Judiciary — a branch of government that lacks the power or resources to protect its own interests in such

political disputes. Legislators refused to adjust judicial salaries unless their own salaries are increased at the same time, and a series of Governors refused to approve legislative pay raises unless legislators agree to an oft-changing raft of initiatives reported to include campaign finance reform, charter schools, education tax credits, congestion pricing, budget policy, racing and wagering, and other unrelated initiatives. Each side ultimately was unwilling to compromise, leading to continued gridlock and a string of broken promises with respect to judicial compensation.

42. This gridlock has persisted for several years with little sign of progress. When, in March 2005, Chief Judge Kaye provided the executive and legislative branches with a report describing the woeful status of judicial compensation in the State and detailing the legislative proposal to solve the problem, State leaders assured her that judicial salary reform was a priority and would be forthcoming. But these promises of reform were never kept.

43. Thus, in June 2005, then-Governor Pataki proposed to increase the salaries of all State-paid judges and to restore pay parity between State Supreme Court Justices and United States District Judges. In so doing, the Governor stated that "[w]e need to continue to do everything we can to attract the highly skilled professionals that have served our state so well," and he promised that "we can address this issue before the end of the legislative session, and provide our judges and justices with the support they have earned and deserve." John Caher, *Pataki Introduces Bill To Raise Judicial Pay*, N.Y.L.J., June 6, 2005. But the Governor could not deliver on his promise. Legislators were unwilling to approve a judicial pay increase without a raise for themselves, and Governor Pataki was unwilling to approve a legislative pay raise.

44. This political dispute carried over into the State's budget process in each of the next three years. In 2006, as set forth above, Governor Pataki and the Legislature approved a budget that included $69.5 million for judicial salary reform, again announcing their support for Chief Judge Kaye's reforms. But despite the availability of these funds in the budget, the

Legislature ultimately refused to adopt legislation necessary to implement the pay increases, again because the members of the Legislature were unable to secure raises for themselves.

45. In 2007, the whole process took a step backward. The year began with the inauguration of then-Governor Spitzer, who would soon speak publicly of the pressing need for judicial compensation reform and say that he would deliver a pay increase for judges. By the time the State's budget was approved later that year, however, it contained no funding for increases in judicial salaries. Instead, the funding for judicial pay increases — including reappropriation of the funds that had been included in the 2006 Judiciary Budget — had been removed altogether in the midst of unrelated disputes between the Governor and the Legislature. Once again, legislators were unwilling to consider a judicial salary increase without the creation of a commission that would set future salary increases for themselves, as well as for judges. *See* Joel Stashenko & Daniel Wise, *Judges' Raises Out of Budget After Last-Minute Bargaining*, N.Y.L.J., April 2, 2007. Governor Spitzer, in turn, was unwilling to finally enact any legislative raise unless it was tied to unrelated political issues, including campaign finance reform.

46. The political stalemate continued throughout 2007. Governor Spitzer again said that judicial pay increases were forthcoming, but again reform did not come. In March, the Assembly approved a version of the Judiciary Budget that would have increased judicial salaries to the levels proposed by Chief Judge Kaye, but agreement with the Senate and Governor Spitzer was not reached and the budget as finally enacted made no provision for a judicial pay increase. *See* A.4306-B. In April 2007, the State Senate passed a bill that would have increased the salaries of all State-paid judges and restored the pay parity between State Supreme Court Justices and federal District Judges. The bill would have also created a commission responsible for reviewing and, as necessary, increasing judicial and legislative salaries in the future. *See* S. 5313 (2007). Governor Spitzer refused to go forward with any bill that increased both judicial and legislative salaries unless the Legislature agreed to campaign finance reform. When the Legislature refused to agree to campaign finance reform, the judicial pay bill died. When the

Senate tried, in December 2007, to break the deadlock by passing a bill increasing judicial salaries without an accompanying increase for legislators, the Assembly refused to support it, lest legislators lose a bargaining chip in their ongoing fight with the Governor to secure a pay raise for themselves. *See* S. 6550 (2007).

47. To this day the logjam continues. On Wednesday, March 12, 2008, Governor Spitzer announced his resignation. The very next day, his successor David A. Paterson acknowledged "the need to find a way to raise . . . [judicial] salaries because we are trying to get the best and the brightest to stay on the bench, knowing that their salaries are not even up to first year associates at major law firms." Joel Stashenko, *Citing Economy, Paterson Says Chances For Raise 'Very Difficult'*, N.Y.L.J., Mar. 14, 2008, at 1. But the new Governor admitted that "obviously" there is a linkage between legislative and judicial pay increases — a linkage he would like to break but that "has not worked to this point." Consequently, he said, it would be "very difficult" to increase judicial salaries. And while, as set forth above, the enacted 2008-2009 budget purports to contain funds for judicial salary increases, the Legislature refuses to pass and the Governor has not signed necessary legislation implementing these increases because they remain linked with and deadlocked over legislative salary increases.

48. The Judiciary thus remains caught in the middle of controversies that have no relationship to the merit of judicial pay increases — a situation that has gone on for years and shows no signs of resolution. This situation demeans the Judiciary, turning it into a political tool to advance unrelated agendas and economic interests of the other branches of government. Such linkage has been seriously criticized by numerous independent, outside authorities, including: the ABA Standing Committee on Judicial Independence; the National Center for State Courts; the Chief Justice of the United States in his year-end report on the federal Judiciary; the report in 1976 of a National Commission on Executive, Legislative, and Judicial Salaries; and the American College of Trial Lawyers.

49. The Legislature and the Executive have been far more attentive to the needs of other State employees. Over the last nine years, the State has repeatedly increased the salaries of such nonjudicial employees, many of whom are paid pursuant to 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* CIVIL SERVICE LAW art. 14; CIVIL SERVICE LAW § 130. Likewise, the State routinely grants senior attorneys in the legislative and executive branches periodic compensation increases. In total, approximately 195,000 New York State government employees have received regular salary increases during this period. The State has explicitly disqualified UCS judges from the periodic salary-review system applicable to other State employees. *See* CIVIL SERVICE LAW § 201(7)(a).

50. The pay increases granted to other State employees have aggregated at least 24 percent since 1999, ensuring that they would keep pace with inflation. *See* NCSC REPORT at 10. Some State employees have received even larger pay increases. For example, in January 1999 the highest salary on any of the State's published salary schedules was approximately $116,000 — about $20,000 *less* than a Supreme Court Justice's salary. 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. *See* CIVIL SERVICE LAW § 130.

51. Although a small number of other State officials, including legislators, have not received salary adjustments since 1999, the effect on judges has been considerably more severe. New York State legislators are already among the best-paid in the Nation. They rank third in absolute terms among those states that pay legislators an annual salary. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, LEGISLATOR COMPENSATION 2007. Even when adjusted for cost of living, New York legislators still rank sixth in the Nation, compared to 49th in the Nation for New York judges. Moreover, New York legislators are able to hold outside jobs, and in some cases, they hold quite lucrative ones. But judges constitutionally and ethically are prohibited from offsetting their stagnating salaries with additional employment, except in limited

circumstances. *See* N.Y. CONST. art. VI, § 20(b)(4); 22 N.Y.C.R.R. § 100.4. Judges also are the only high State officers to serve lengthy terms of office — up to 14 years, sometimes extended — and thereby assume the unique public trust of continuing in service without timely pay adjustment over the many years of their terms. Additionally, legislators and executive officials have the capacity directly to engage the political process to increase their salaries. By contrast, judges do not have a direct appropriation power and ethically must refrain from most political activity. Judges are thus virtually the only State employees whose salaries have been frozen without any meaningful recourse.

52. Because judges' salaries have remained frozen, while most other salaries have at least kept pace with inflation, judges have fallen far behind nonjudicial professionals with comparable education and experience. Even many public-sector employees in New York, including experienced attorneys, earn significantly more than the State's judges. For example, according to the NCSC:

- The deans of New York State's public law schools each earn at least $215,000, almost $80,000 more than a Supreme Court Justice;
- District Attorneys in New York City earn $190,000, almost $54,000 more than a Supreme Court Justice;
- The New York City Corporation Counsel earns $189,700, over $50,000 more than a Supreme Court Justice;
- Attorneys in the State Comptroller's Office earn up to $160,000, over $20,000 more than a Supreme Court Justice;
- Over 775 medical doctors employed by the State earn more than a Supreme Court Justice;
- Over 1,350 professors in the State and City University systems earn more than a Supreme Court Justice; and
- Over 1,250 public school administrators, including elementary school principals, earn more than a Supreme Court Justice.

53. Judicial salaries also fall well short of the compensation of private-sector attorneys in the State, and the disparity continues to grow apace. In 2004, the New York State Bar Association found that the annual compensation of senior partners at firms with ten or more lawyers averaged $350,000 statewide — more than *two and one-half times* the salary of a Supreme Court Justice. Since 2004, the pay gap between private-sector lawyers and New York judges has accelerated. In 2007, New York City's largest firms paid their first-year associates, many of whom are not even yet admitted to the bar, salaries substantially more than those of any State-paid judge, and even paid these newly-minted lawyers considerable bonuses above their salaries. The compensation of senior partners at those firms, whose experience is more comparable to judges, is many times higher.

54. Even some *non*judicial employees in the New York Judiciary now earn more than judges. In fact, hundreds of Judiciary employees receive salaries in excess of what the State's lowest-paid full-time judges receive. In some cases, nonjudicial employees earn more than the judges for whom they directly work. This situation, which demeans the judicial office and impairs effective courtroom management, will only get worse if judges do not receive a pay increase soon, as most nonjudicial court employees receive automatic annual pay increases pursuant to collective bargaining agreements ratified by the Legislature.

55. As befits members of a co-equal branch of government, New York judges have traditionally been drawn from among the most experienced members of the legal profession. Service on the State Supreme Court requires a minimum of ten years' admission to the bar, and the average experience of a new Justice is currently over 18 years. But if the State continues to pay judges less than associates fresh out of law school, and much less than senior lawyers in the private sector — with no prospect of regular salary adjustments — that cannot help but discourage the fittest, most experienced attorneys to seek the bench, thus threatening to impair the effectiveness of the Judiciary for years to come.

56. Many State judges have stated, publicly and in surveys conducted by the NCSC, that they are unable to keep up with increasing expenses and support their families without taking on debt burdens. Between 2004 and 2007 alone, for example, the number of New York judges who took loans against their pensions quadrupled. Many judges have stated that such burdens will soon leave them with no choice but to leave the bench solely for financial reasons. Some judges have already done so, and the much larger number of departures that the ongoing pay crisis is sure to encourage imminently jeopardizes the collective corps of judicial experience and expertise on which the proper administration of justice depends.

57. For those judges that remain on the bench, morale is at an historic low point. Although our judges continue to uphold their basic constitutional duty to hear and decide the cases before them, low morale threatens to impair the effectiveness of the Judiciary.

* * * *

58. The foregoing facts demonstrate that the defendants have violated their constitutional obligations. By abdicating their constitutional duty to provide adequate judicial compensation and by subordinating judges' needs to their own political interests, the Legislature and the Executive have violated the constitutional separation of powers, which establishes the Judiciary as a co-equal branch of government.

59. The Legislature and the Executive also have discriminated against the Judiciary, allowing the real value of judicial salaries to diminish by over one quarter at the same time they were regularly increasing the salaries of other State employees. This disproportionate diminution in judicial salaries violates the Compensation Clause and threatens to undermine the independence and effectiveness of the Judiciary.

60. In light of these ongoing violations of the Constitution, this Court can and must order that the State's Judiciary be paid the amounts that the political branches agree that the Judiciary is entitled to but that those branches have refused to provide.

AS AND FOR A FIRST CAUSE OF ACTION

Violation of the Separation of Powers and the Independence of the Judiciary (By Failing to Provide Adequate Judicial Compensation) (New York State Constitution, Article VI)

61. Plaintiffs repeat the allegations of Paragraphs 1 through 60 as though fully set forth herein.

62. To preserve the separation of powers and the independence of the Judiciary, the Constitution imposes on the State an absolute duty to establish, fund, and disburse adequate judicial compensation. *See* N.Y. CONST. art VI.

63. To meet the constitutional requirements of adequacy, judicial compensation must be proportionate to the learning, experience, and position of judges, and it must be commensurate with the duties and responsibilities of judges in our constitutional system of government.

64. If the political branches fail to fulfill their constitutional obligation to furnish adequate judicial compensation, this Court has an inherent power to order an appropriate remedy.

65. The State has frozen judicial salaries for over nine years, during which time the cost of living in New York State has increased dramatically. By any measure, including:

- what New York State judges were paid historically,
- what judges in other States are presently paid,
- what federal District Judges are presently paid,

- what attorneys in significant positions in public service earn,
- what attorneys in private practice earn, including first-year lawyers in firms in major cities where many of the judges are located,
- what professors and deans of New York law schools earn,
- what is necessary to provide compensation proportionate to the position which judges occupy in our society, and
- what the Executive and the Legislature have conceded in various proposals to be an adequate salary,

there can be no question that the salaries of New York State judges have been permitted to decline to a level that is constitutionally inadequate.

66. Notwithstanding the broad agreement by the Executive and both Houses of the State Legislature that it is necessary and appropriate to bring the judicial pay of New York State Supreme Court Justices in line with the compensation of federal District Judges and to adjust the salaries of other State-paid trial and appellate judges to the adequate levels proposed by the Chief Judge, the State has failed to act. This conduct by the other branches of government — their refusal to provide adequate judicial compensation — is an abuse of power by the Executive and the Legislature. It undermines the independence of the Judiciary and violates the separation of powers.

67. Defendants have violated Article VI of the New York State Constitution. The judicial salaries codified in Article 7-B, sections 221 through 221-i, of the Judiciary Law are unconstitutional.

68. A judicial determination is necessary to resolve the legal issues, to declare the rights and duties of the parties concerning judicial compensation in this State, and to provide a remedy for the constitutional violations pleaded in this Complaint.

69. Plaintiffs have no adequate remedy at law.

AS AND FOR A SECOND CAUSE OF ACTION

Violation of the Judicial Compensation Clause
(By Singling Out Judges for Specially Unfavorable Treatment)
(New York State Constitution, Article VI, Section 25(a))

70. Plaintiffs repeat the allegations of Paragraphs 1 through 69 as though fully set forth herein.

71. Article VI, §25(a) of the New York State Constitution provides that judicial salaries shall not be diminished during a judge's term in office. This provision prohibits direct diminution in salaries, as well as diminution of purchasing power that affects the Judiciary disproportionately, as compared to virtually all other State employees.

72. As a result of defendants' repeated failures to increase judicial salaries since January 1999, the real value of judicial compensation has diminished by 27 percent. This diminution has had discriminatory adverse effects on the Judiciary in that defendants repeatedly have increased the compensation of virtually all other 195,000 State employees during the nine-year duration of the ongoing judicial pay freeze, thus permitting the wages of such employees, but not of judges, to keep pace with inflation. Of the relatively few State officials denied pay adjustments during this time, judges comprise the overwhelming majority. Moreover, judges uniquely bear the constitutional and ethical limitations against supplementing State-paid income with outside employment, constitutional and ethical restrictions against engaging the political process to seek redress for their frozen compensation, and 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. As such, defendants have targeted the Judiciary for uniquely discriminatory and inferior treatment resulting in a diminution of their compensation. Judges have been singled out for specially unfavorable treatment.

73. In addition, defendants have targeted the Judiciary for discriminatory and inferior treatment with regard to compensation by using the salaries of judges, but not of other

State officials, as hostages to the achievement of unrelated political interests. As judges bear unique constitutional and ethical obligations, and corresponding incapacities to obtain meaningful redress in the political process, taking the Judiciary hostage is uniquely harmful.

74. Defendants have violated Article VI, § 25(a) of the New York State Constitution. The judicial salaries codified in Article 7-B, sections 221 through 221-i, of the Judiciary Law are unconstitutional.

75. A judicial determination is necessary to resolve the legal issues, to declare the rights and duties of the parties concerning judicial compensation in this State, and to provide a remedy for the constitutional violations pleaded in this Complaint.

76. Plaintiffs have no adequate remedy at law.

AS AND FOR A THIRD CAUSE OF ACTION

Violation of the Separation of Powers and the Independence of the Judiciary (By linking judicial salaries to legislative salaries and other unrelated political matters) (New York State Constitution, Article VI)

77. Plaintiffs repeat the allegations of Paragraphs 1 through 76 though fully set forth herein.

78. The separation of powers and the constitutionally guaranteed status of the Judiciary as an independent, co-equal branch of government impose a duty on the executive and legislative branches to set judicial compensation independently, on the merits, and not to tie the provision of such compensation to issues unrelated to the Judiciary. *See* N.Y. CONST. art VI.

79. By holding the setting of judicial compensation hostage to issues unrelated to the Judiciary, the Executive and the Legislature violate the separation of powers and subvert the independence of the Judiciary. Defendants undermine the co-equal status of the Judiciary — a

coordinate branch of government — by making the setting of judicial compensation dependent on the political willingness of legislators to increase their own salaries. Additionally, by involving the Judiciary in the Legislature and Executive's unrelated political agenda to which the fate of judicial pay increases is tied, defendants violate the separateness and independence of the Judiciary guaranteed by the Constitution.

80. Defendants have conceded both in word and in the repeated proposal and passage of specific legislation that current judicial compensation should be increased to the levels proposed by the Chief Judge and reflected in such legislation.

81. For the purpose of linking judicial compensation to political issues unrelated to the Judiciary, defendants have refused to enact into law the very judicial salary measures which they concede are necessary. Having conceded the propriety and necessity of these pay adjustments, defendants' misuse and demeaning of the Judiciary by holding judicial pay hostage in this manner constitutes an abuse of power by the Executive and the Legislature, subverts the independence of the Judiciary, and violates the separation of powers.

82. Defendants have violated Article VI of the New York State Constitution. The judicial salaries codified in Article 7-B, sections 221 through 221-i, of the Judiciary Law are unconstitutional.

83. A judicial determination is necessary to resolve the legal issues, to declare the rights and duties of the parties concerning judicial compensation in this State, and to provide a remedy for the constitutional violations pleaded in this Complaint.

84. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment against defendants as follows:

1. As to the first cause of action, a declaratory judgment pursuant to CPLR § 3001 that the Executive and the Legislature violated the independence of the Judiciary and the separation of powers guaranteed by Article VI of the New York State Constitution by failing to provide adequate judicial compensation;

2. As to the second cause of action, a declaratory judgment pursuant to CPLR § 3001 that the Executive and the Legislature have violated Article VI, § 25(a) of the New York State Constitution, by treating judges in a discriminatory fashion, permitting judicial compensation to diminish by virtue of inflation while raising the salaries of virtually all other employees of the State ensuring that those State employees, unlike judges, would not fall behind the cost of living; and by taking as hostage to other issues judicial compensation but not the pay of other State officials;

3. As to the third cause of action, a declaratory judgment pursuant to CPLR § 3001 that the Executive and the Legislature have violated the independence of the Judiciary and the separation of powers guaranteed by Article VI of the New York State Constitution by linking judicial salaries to unrelated issues and thereby refusing to enact into law reforms of judicial compensation which defendants have conceded to be necessary;

4. An order, pursuant to CPLR § 5011 and § 3017(b), fixing the salaries for the judges of each State-paid court, between a date no later than April 1, 2005 and the date judgment is entered in this action, as follows: (a) the salaries of Justices of the New York State Supreme Court shall be equal to those of United States District Judges, pay parity which the Executive and the Legislature have conceded is appropriate; and (b) the salaries of all other State-paid judges shall be fixed at amounts reflecting those relationships to the salaries of Justices of the Supreme

Court urged by plaintiff Chief Judge in legislative proposals submitted to the Legislature by her office between 2005 and 2008, and separately endorsed by the Executive, Senate, and Assembly;

5. An order, pursuant to CPLR § 5011 and § 3017(b), compelling the State timely to remit to the judges of the State-paid courts such amounts as directed by the Court; and

6. Such other and further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

Dated: New York, New York
April 10, 2008

Of Counsel:

Bernard W. Nussbaum
Marc Wolinsky
George T. Conway III
Graham W. Meli
Kevin S. Schwartz

WACHTELL, LIPTON, ROSEN & KATZ

By: _____
Bernard W. Nussbaum
A Member of the Firm

51 West 52nd Street
New York, New York 10019
Telephone: (212) 403-1000

MICHAEL COLODNER, ESQ.
NEW YORK STATE OFFICE OF COURT ADMINISTRATION
25 Beaver Street, 11th Floor
New York, New York 10004
Telephone: (212) 428-2150

Attorneys for Plaintiffs

Index No.

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

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

Plaintiffs,

v.

SHELDON SILVER, in his official capacity as Speaker of the New York State Assembly, THE NEW YORK STATE ASSEMBLY, JOSEPH L. BRUNO, in his official capacity as Temporary President of the New York State Senate, THE NEW YORK STATE SENATE, DAVID A. PATERSON, in his official capacity as Governor of the State of New York, and THE STATE OF NEW YORK,

Defendants.

COMPLAINT

WACHTELL, LIPTON, ROSEN & KATZ
51 WEST 52nd STREET
NEW YORK, NY 10019
(212) 403-1000

MICHAEL COLODNER, ESQ
N.Y. STATE OFFICE OF COURT ADMINISTRATION
25 BEAVER STREET, 11th FLOOR
NEW YORK, NY 10004
(212) 428-2150

Attorneys for Plaintiffs

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

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

Plaintiffs,

- against -

SHELDON SILVER, in his official capacity as Speaker of the New York State Assembly, THE NEW YORK STATE ASSEMBLY, JOSEPH L. BRUNO, in his official capacity as Temporary President of the New York State Senate, THE NEW YORK STATE SENATE, DAVID A. PATERSON, in his official capacity as Governor of the State of New York, and THE STATE OF NEW YORK,

Defendants.

Index No.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A PROMPT TRIAL

Of Counsel:
Bernard W. Nussbaum
Marc Wolinsky
George T. Conway III
Graham W. Meli
Kevin S. Schwartz

Dated: New York, New York
April 10, 2008

WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019-6150
Telephone: (212) 403-1000
Facsimile: (212) 403-2000

MICHAEL COLODNER, ESQ.
NEW YORK STATE OFFICE OF COURT ADMINISTRATION
25 Beaver Street, 11th Floor
New York, New York 10004
Telephone: (212) 428-2150

Attorneys for Plaintiffs

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PRELIMINARY STATEMENT

Plaintiffs respectfully submit this memorandum of law in support of their application for a prompt trial in which all parties will be called to testify. The purpose of the trial is to show that the Executive, and the Legislature and its leadership:

— have violated the separation of powers and independence of the Judiciary guaranteed by Article VI of the New York State Constitution by failing to provide adequate judicial compensation;

— have violated the Compensation Clause of the State Constitution (Article VI, Section 25(a)) by singling out the judges of this State for specially unfavorable treatment in that for the past decade they increased the salaries of virtually all State employees, so that these employees could keep pace with inflation, but have refused to do so for judges; and

— have violated the separation of powers and independence of the Judiciary by holding such compensation hostage to unrelated political concerns and their personal, financial self-interest.

A prompt trial is needed as the judicial-pay impasse has risen to the level of a constitutional crisis. New York's judges have lost more than a quarter of their salaries to inflation in the last decade, leaving them among the worst-paid judges in the Nation — 49th out of the 50 states, to be exact. Judicial morale is rapidly diminishing, making it difficult to implement initiatives to address growing caseloads and other problems faced by the judicial system. The defendants themselves have recognized that their failure to raise judicial salaries

has created a serious problem for our State. But rather than act, they have insisted upon holding judicial pay raises hostage to unrelated issues, all in violation of the State Constitution.

A trial is the appropriate means to resolve the issues raised by this suit. And for the reasons set forth below, when one branch of government is suing the others, nothing in the New York State Constitution prevents this trial from being held and the defendants — including the Governor and the leaders of the Legislature — from being called to testify. There are no immunities, Speech or Debate or otherwise, which bar such suit or such testimony. The Court should grant plaintiffs' application for a trial to commence on or about May 14, 2008.

ARGUMENT

NEITHER EXECUTIVE NOR LEGISLATIVE IMMUNITY EXISTS WHEN ONE CO-EQUAL BRANCH OF GOVERNMENT SUES THE OTHER TWO FOR UNDERMINING ITS CONSTITUTIONALLY GUARANTEED INDEPENDENCE.

A. The Speech Or Debate Clause Does Not Immunize The Governor Or Legislators From Being Questioned In A Lawsuit Brought Against Them By The Independent Judiciary.

Article III, Section 11 of the State Constitution grants immunity to legislators from being "questioned in any other place" based on their "speech or debate in either house of the legislature." The New York Court of Appeals has construed the scope of this privilege to comport with the protections established in the Speech or Debate Clause in the federal Constitution. *See People* v. *Ohrenstein*, 77 N.Y.2d 38, 54 (1990). Executive officials also enjoy this immunity based on their performance of "legislative functions." *Bogan* v. *Scott-Harris*, 523 U.S. 44, 55 (1998).

But this grant of immunity is not absolute. As the United States Supreme Court has recognized, the Speech or Debate Clause does not prevent the executive or legislators from being questioned about actions that are outside "the *'sphere of legitimate legislative activity.'*" *Bogan*, 523 U.S. at 54 (emphasis added) (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951)); *see also Urbach* v. *Farrell*, 229 A.D.2d 275 (3d Dep't 1997). In *United States* v. *Brewster*, 408 U.S. 501 (1972), the Court stated:

> In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the *Speech or Debate Clause* has been limited to an act which was clearly a part of the legislative process — the *due* functioning of the process.

Id., 408 U.S. at 515-16.

In determining what is part of the legislative process, the Supreme Court has applied a "practical rather than . . . strictly literal reading" of the Speech or Debate Clause, *Hutchinson* v. *Proxmire*, 443 U.S. 111, 124 (1979). The Court concluded that legislators' contact with and efforts to influence the executive branch are "not protected legislative activity." *Gravel* v. *United States*, 408 U.S. 606, 625 (1972); *see also Doe* v. *McMillan*, 412 U.S. 306, 313 (1973). Through testimony in the case at bar, plaintiffs will demonstrate that legislators and the Governors — past and present — in their contacts with one another have held the issue of judicial compensation hostage to unrelated political issues on which they sought to influence each other. This course of dealing between the Executive and the Legislature — this hostage-taking — is "not protected legislative activity." It is not protected by the Speech or Debate Clause. *Gravel*, 408 U.S. at 625.

But even if the conduct of the defendants and their predecessors in this case is considered legislative activity, the Speech or Debate Clause does not preclude this case from

proceeding and a trial from being held, for the Supreme Court has also held that "[l]egislative immunity does not . . . bar all judicial review of *legislative* acts." *Powell* v. *McCormack*, 395 U.S. 486, 503 (1969) (emphasis added) (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)).

While rarely presented to the courts, the unique nature of a separation-of-powers challenge brought *by one co-equal branch against another* squarely implicates the United States Supreme Court's circumscription of legislative immunity. Noting that the Speech or Debate Clause was "not written into the Constitution simply for the personal or private benefit of Members of Congress," the Court stated: "Our speech or debate privilege was designed to preserve legislative independence, not supremacy. *Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.*" *Brewster*, 408 U.S. at 508 (emphasis added); *see also id.* at 517 ("[T]he shield does not extend beyond what is necessary to preserve the integrity of the legislative process.").

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

Recent decisions by the highest courts in two sister States demonstrate that legislative immunity — the Speech or Debate Clause — does not bar a separation-of-powers challenge brought by one co-equal branch of government against another.

In *Office of the Governor* v. *Select Committee of Inquiry*, 858 A.2d 709 (Conn. 2004), a House of Representatives Select Committee of Inquiry issued a subpoena for the Governor to testify before it. The Governor sued to quash the subpoena. The Select Committee responded that under the Speech or Debate Clause "the constitutional validity of [the subpoena's] issuance is immune from judicial review." *Id.* at 559. In this setting of an interbranch conflict, the Connecticut Supreme Court rejected the Committee's contention. It concluded that the Speech or Debate Clause protections do not apply 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 559-560 (emphasis added).

The Connecticut Supreme Court recognized the fundamental distinction between the legitimate exercise of legislative authority, and *ultra vires* conduct which 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. 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. As the court concluded: "[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." *Select Comm. of Inquiry*, 858 A.2d at 724.

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

In rejecting this claim of immunity, the Pennsylvania Supreme Court stated that "at issue is the continued existence of an independent judiciary. The Speech and Debate clause does not insulate the legislature from this court's authority to require the legislative branch to act in accord with the Constitution." *Id.* at 703. Noting that legislators' compliance with an order to provide adequate judicial funding was "necessary for the continued existence of the judicial branch of government," the court rejected the Speech and Debate Clause as a shield to suit: "If it were, this court's duty to interpret and enforce the Pennsylvania Constitution would be abrogated, thus rendering ineffective the tripartite system of government which lies at the basis of our constitution." *Id.* at 702.

Nothing in plaintiffs' request for a trial in this action is inconsistent with this Court's holding in *Larabee* v. *Spitzer*, 850 N.Y.S.2d 885, 19 Misc. 3d 226 (N.Y. Sup. Ct. N.Y. Co. 2008). *Larabee* was lodged by individual plaintiffs; this case is brought by a co-equal branch of government to deal with the political branches' violation of the separation of powers. As indicated above, no court has interpreted the Speech or Debate Clause to bar suit by a co-equal branch of government for a separation-of-powers violation. To the contrary, where such a challenge was presented, the Connecticut Supreme Court deemed adverse precedent to be "distinguishable" precisely "because it involved a claim raised by a private party." *Select Comm. of Inquiry*, 858 A.2d at 726. The court stated: "[H]ere, a challenge to legislative conduct [is] brought by a coequal branch of government. Indeed, we are unaware of any speech or debate

case in which the clause was held to insulate . . . legislative [conduct] . . . that had been challenged on the basis of the separation of powers." *Id.* at 726.*

Also, in contrast to *Larabee*, plaintiffs' Complaint here does not seek to compel the specific exercise of the "legislative function". *See Bogan*, 523 U.S. at 55. Rather, plaintiffs ask this Court to order the State to remit a fixed amount to judges. Plaintiffs' requested relief does not require the Governor to sign, or the Legislature to vote on, any particular legislative enactment. And there can be no doubt that if this Court finds a constitutional violation, it can remedy that violation by ordering the state to make appropriate payments. As the Supreme Court of Pennsylvania stated almost two decades ago:

> Although the legislative branch of our government has the power and authority to set the salary scale for the judiciary, as a co-equal branch of our tripartite form of government, the "[j]udiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities. . . ." *Commonwealth ex rel. Carroll* v. *Tate*, 442 Pa. at 52, 274 A.2d at 197 (emphasis in original). Therefore it follows that this Court has the inherent power to ensure the proper functioning of the judiciary by ordering the executive branch of government to provide appropriate funding so that the people's right to an efficient and independent judiciary is upheld.

Goodheart v. *Casey*, 555 A.2d 1210, 1212 (Pa. 1989) (internal citation omitted); *see also* *Jorgensen* v. *Blagojevich*, 811 N.E.2d 652 (Ill. 2004).

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* The Appellate Division's decision in *Straniere* v. *Silver*, 637 N.Y.S.2d 982, 986 (3d Dep't), *aff'd* 89 N.Y.2d 825 (1996), is distinguishable. In *Straniere*, the Third Department held that in an action brought by a private party the court may not "strip acts taken in the legislative process of their constitutional immunity by finding that the acts are substantively illegal or unconstitutional." *Id.* The instant action is not brought by a private party. It is brought by an independent branch of government. Also, unlike *Straniere*, which involved whether a home rule message was required before the Legislature could act, our claim — that defendants have violated the separation of powers and invaded the independence of the judicial branch — involves conduct which falls outside the "sphere of legitimate legislative activity." *Id.* at 985.

B. No Other Immunities Exist Shielding One Co-Equal Branch Of Government From Suit By Another.

Interbranch conflict over the separation of powers long has been recognized to be a unique context in which immunities, which might otherwise exist, cannot shield one branch's conduct from the scrutiny of another branch exercising its plenary power of review.

One prominent example of interbranch conflict is impeachment. Cases involving the Judiciary's right to review the scope of the Legislature's impeachment power and to evaluate the Executive's competing claim of immunity show that immunities from suit or trial that normally would be honored are not honored when there is an interbranch conflict.

In *United States* v. *Nixon*, 418 U.S. 683 (1974), the Supreme Court considered the President's invocation of the separation of powers during an impeachment investigation as a basis for categorical immunity from compliance with judicial process. The Court rejected sweeping claims of executive immunity from judicial process because such immunity, even if based on separation-of-powers principles, would impose too serious an impediment on a coordinate branch of government: "[T]he doctrine of the separation of powers . . . [cannot] sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Id.* at 706.

Three decades later in *Select Committee of Inquiry*, as set forth above, the Connecticut Supreme Court applied this reasoning to repudiate legislative claims of immunity from judicial review in the course of the Legislature's impeachment investigation of the Governor.

In the Connecticut case, the executive branch also made a claim of immunity. The Governor maintained he could not be compelled to comply with the subpoena issued by the Legislature. Just as the Court rejected the Legislature's claim of immunity, it rejected the Governor's claim and ruled that he would have to comply with the subpoena:

> In terms of the separation of powers, we see no persuasive reason why . . . holdings rejecting categorical immunity of the chief executive from judicial process should not apply to a similar claim of categorical immunity from legislative process issued in the course of the legislature's exercise of its core constitutional power to impeach.

858 A.2d at 734.

As "the ultimate expositor of the constitutional text," the Judiciary is charged with preserving the separation of powers by adjudicating whether the legislative and executive branches violated the independence of a co-equal branch of government. *United States* v. *Morrison*, 529 U.S. 598, 617 n.7 (2000); *see also Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). Given the Constitution's reservation of this power to the Judiciary, it "would be constitutionally perverse to conclude that it would be a violation of the separation of powers doctrine" for the court to discharge its responsibilities by questioning defendants about their alleged abuses of power. *Select Comm. of Inquiry*, 858 A.3d at 736; *see also id.* at 739-40.

Apart from judicial decisions, the historical record also supports the rejection of all immunities when there is an interbranch conflict.

In 1842, John Quincy Adams (while serving in the House of Representatives after his presidency) observed "it would be a mockery" for the Legislature to bear the power of impeachment over the President yet lack "the power to obtain the evidence and proofs on which

impeachment was based." *Id.* at 735 (citing M. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS (2000) (quoting CONG. GLOBE, 27th CONG., 2d SESS., p. 580 (1842))).

Several years later, in 1846, President James K. Polk elaborated on this principle in the context of impeachment:

> If the House of Representatives, as the grand inquest of the nation, should at any time have reason to believe that there has been malversation in office . . . , and should think proper to institute an inquiry into the matter, *all the archives and papers of the Executive Departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive be afforded to enable them to prosecute the investigation.*
>
> * * *
>
> In such a case the safety of the Republic would be the supreme law, and the power of the House in the *pursuit of this object would penetrate into the most secret recesses of the Executive Departments. It could command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all the facts within their knowledge.*

Id. (citing 4 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 434-35 (1897)) (emphasis added).

In light of applicable precedent and the historical record, in this action brought by the Chief Judge and the Unified Court System against the Governor, and the Legislature and its leaders, there is no immunity which prevents this Court from holding these other branches accountable for their violation of the separation of powers and the independence of the Judiciary.

They can be sued and their leaders can be called to testify.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request that this Court grant plaintiffs' application for a prompt trial.

Dated: April 10, 2008
New York, New York

Of Counsel:

Bernard W. Nussbaum
Marc Wolinsky
George T. Conway III
Graham W. Meli
Kevin S. Schwartz

WACHTELL, LIPTON, ROSEN & KATZ

By: _____
Bernard W. Nussbaum
A Member of the Firm

51 West 52nd Street
New York, New York 10019-6150
Telephone: (212) 403-1000
Facsimile: (212) 403-2000

MICHAEL COLODNER, ESQ.
NEW YORK STATE OFFICE OF COURT ADMINISTRATION
25 Beaver Street, 11th Floor
New York, New York 10004
Telephone: (212) 428-2150

Attorneys for Plaintiffs

WACHTELL, LIPTON, ROSEN & KATZ

MARTIN LIPTON
HERBERT M. WACHTELL
BERNARD W. NUSSBAUM
RICHARD D. KATCHER
ALLAN A. MARTIN
LAWRENCE B. PEDOWITZ
ROBERT B. MAZUR
PAUL VIZCARRONDO, JR.
PETER C. HEIN
HAROLD S. NOVIKOFF
DAVID M. EINHORN
KENNETH B. FORREST
MEYER G. KOPLOW
THEODORE N. MIRVIS
EDWARD D. HERLIHY
DANIEL A. NEFF
ERIC M. ROTH
WARREN R. STERN
ANDREW R. BROWNSTEIN
MICHAEL H. BYOWITZ
PAUL K. ROWE
MARC WOLINSKY
DAVID GRUENSTEIN
PATRICIA A. VLAHAKIS
STEPHEN G. GELLMAN
STEVEN A. ROSENBLUM
PAMELA S. SEYMON
STEPHANIE J. SELIGMAN
ERIC S. ROBINSON
JOHN F. SAVARESE
SCOTT K. CHARLES
ANDREW C. HOUSTON
PHILIP MINDLIN
DAVID S. NEILL
JODI J. SCHWARTZ
ADAM O. EMMERICH
CRAIG M. WASSERMAN
GEORGE T. CONWAY III
RALPH M. LEVENE

RICHARD G. MASON
DOUGLAS K. MAYER
MICHAEL J. SEGAL
DAVID M. SILK
ROBIN PANOVKA
DAVID A. KATZ
ILENE KNABLE GOTTS
DAVID M. MURPHY
JEFFREY M. WINTNER
TREVOR S. NORWITZ
BEN M. GERMANA
ANDREW J. NUSSBAUM
RACHELLE SILVERBERG
DAVID C. BRYAN
STEVEN A. COHEN
GAVIN D. SOLOTAR
DEBORAH L. PAUL
DAVID C. KARP
RICHARD K. KIM
JOSHUA R. CAMMAKER
MARK GORDON
JOSEPH D. LARSON
LAWRENCE S. MAKOW
JARED M. RUSMAN
JEANNEMARIE O'BRIEN
WAYNE M. CARLIN
JAMES COLE, JR.
STEPHEN R. DIPRIMA
NICHOLAS G. DEMMO
IGOR KIRMAN
JONATHAN M. MOSES
T. EIKO STANGE
DAVID A. SCHWARTZ
JOHN F. LYNCH
WILLIAM SAVITT
ERIC M. ROSOF
MARTIN J.E. ARMS
GREGORY E. OSTLING

51 WEST 52ND STREET

NEW YORK, N.Y. 10019-6150

TELEPHONE: (212) 403-1000

FACSIMILE: (212) 403-2000

GEORGE A. KATZ (1965-1989)
JAMES H. FOGELSON (1967-1991)

OF COUNSEL

WILLIAM T. ALLEN
PETER C. CANELLOS
THEODORE GEWERTZ
KAREN G. KRUEGER
THEODORE A. LEVINE
LEONARD M. ROSEN
MICHAEL W. SCHWARTZ
ELLIOTT V. STEIN
J. BRYAN WHITWORTH
AMY R. WOLF

COUNSEL

MICHELE J. ALEXANDER
DAVID B. ANDERS
ADRIENNE ATKINSON
ANDREW J.H. CHEUNG
DAMIAN G. DIDDEN
PAMELA EHRENKRANZ
ROBERT A. FRIEDMAN
PAULA N. GORDON
NANCY B. GREENBAUM
MAURA R. GROSSMAN
IAN L. LEVIN
ADAM J. SHAPIRO
HOLLY M. STRUTT

J. AUSTIN LYONS
LORI S. SHERMAN
JONATHAN E. PICKHARDT
NELSON O. FITTS
JEFFREY C. FOURMAUX
JEREMY L. GOLDSTEIN
JOSHUA M. HOLMES
DAVID E. SHAPIRO
ANTE VUCIC
IAN BOCZKO
LAURYN P. GOULDIN
MATTHEW M. GUEST
DAVID E. KAHAN
MARK A. KOENIG
DAVID K. LAM
MICHAEL S. WINOGRAD
KATHRYN GETTLES-ATWA
DANIELLE L. ROSE
BENJAMIN M. ROTH
ANDREW A. SCHWARTZ
DAVID M. ADLERSTEIN
SHIRI BEN-YISHAI
JOSHUA A. FELTMAN
STEPHEN M. FRANCIS
JONATHAN H. GORDON
MARGARET ISA BUTLER
EMIL A. KLEINHAUS
WILLIAM E. SCHEFFER
ADIR G. WALDMAN
AREF H. AMANAT
RONALD C. CHEN
B. UMUT ERGUN
EVAN K. FARBER
MICHAEL KRASNOVSKY
SARAH A. LEWIS
YELENA ZAMACONA
GARRETT B. MORITZ
JOSHUA A. NAFTALIS

VINAY SHANDAL
MEREDITH L. TURNER
KARESSA L. CAIN
WILLIAM EDWARDS
JAMES R. GILMARTIN
ADAM M. GOGOLAK
JONATHAN GOLDIN
ROGER J. GRIESMEYER
DANIEL E. HEMLI
GAVIN W. HOLMES
MATTHEW S. LEVINE
GORDON S. MOODIE
JOHN A. NEUMARK
DONGJU SONG
LINDSAY R. SMITH
AMANDA L. STRAUB
BRADLEY R. WILSON
FRANCO CASTELLI
ROSS A. FIELDSTON
SCOTT W. GOLENBOCK
MOEZ M. KABA
CAITH KUSHNER
J. ALEJANDRO LONGORIA
GRAHAM W. MELI
JOSHUA M. MILLER
OPHIR NAVE
GREGORY E. PESSIN
CARRIE M. REILLY
WON S. SHIN
JEFFREY UNGER
MARK F. VEBLEN
CARMEN WOO
IGOR FUKS
BETTY W. GEE
JONATHON R. LA CHAPELLE
BRANDON C. PRICE
ALISON M. ZIESKE

April 10, 2008

BY HAND

The Honorable Edward H. Lehner
Justice of the Supreme Court
Supreme Court of the State of New York
60 Centre Street, Room 570
New York, New York 10007

Re: *Chief Judge Judith S. Kaye and the New York State Unified Court System* v. *Sheldon Silver, et al.*

Dear Justice Lehner:

We today filed the enclosed Complaint on behalf of the Honorable Judith S. Kaye, Chief Judge of the State of New York, and the New York State Unified Court System. We also filed the enclosed Request for Judicial Intervention seeking a prompt preliminary conference and are enclosing a Memorandum of Law in Support of Plaintiffs' Application for a Prompt Trial.

This action seeks to remedy ongoing violations of the New York State Constitution by New York's Executive and Legislature, who have failed to adjust the compensation of State-paid judges for nearly a decade. We have asked that the case be assigned to Your Honor because it is related to the action captioned *Hon. Susan Larabee, et al.* v. *Eliot Spitzer, et al.*, Index No. 112301/07.

For the reasons discussed below and in the accompanying memorandum of law, we respectfully request the Court to schedule a prompt trial to commence on or about May 14, 2008.

THE NATURE OF OUR CLAIMS

Our Complaint asserts three principal claims.

First, we allege that the executive and the legislative branches have violated the constitutionally guaranteed separation of powers and independence of the Judiciary by failing to fulfill their "constitutional duty and obligation . . . to insure the independence of the judicial . . . branch of government, to provide compensation adequate in amount and commensurate with the duties and responsibilities of . . . judges," *Goodheart* v. *Casey*, 555 A.2d 1210, 1212 (Pa. 1989) (quoting *Glancey* v. *Casey*, 288 A.2d 812, 816 (Pa. 1972)). The court in *Goodheart* also set forth the meaning of adequacy:

> "Adequate" means sufficient for a specific purpose. In this case, it necessarily means sufficient to provide judges with a level of remuneration proportionate to their learning, experience, and elevated position they occupy in our modern society. Inherent in this definition is the increasingly costly obligations of judges to their spouses and families, to the rearing and education of their children and to the expectation of a decent, dignified life upon departure from the bench.

Id. at 1212 (citation omitted).

The State of New York, alone among the 50 states and the federal government, has frozen judicial salaries for over nine years, during which time the cost of living has increased dramatically. By any measure, including:

- what New York State judges were paid historically,
- what judges in other States are presently paid,
- what federal District Judges are presently paid,
- what attorneys in significant positions in public service earn,
- what attorneys in private practice earn, including first-year lawyers in firms in major cities where many of the judges are located,
- what professors and deans of New York law schools earn,

- what is necessary to provide compensation proportionate to the position which judges occupy in our society, and
- what the Executive and the Legislature have conceded in various proposals to be an adequate salary,

there can be no question that the salaries of New York State judges have been permitted to decline to a level that is constitutionally inadequate.

Second, we allege that the executive and legislative branches have violated the Compensation Clause of the State Constitution. We are aware that in *Larabee* Your Honor dismissed a Compensation Clause claim. But that claim was premised solely on the theory that the failure to respond to inflation alone over the past nine years, diminishing judicial salaries, violates the Compensation Clause. Our theory adds a crucial element — we contend that the Compensation Clause has been violated by virtue of the *discriminatory* treatment in the face of inflation that the Judiciary has suffered at the hands of the executive and legislative branches.

Specifically, we allege that while these branches have regularly approved salary increases for virtually all other State employees — approximately 195,000 employees — to account for inflation, they have refused to adjust judicial salaries. In *United States* v. *Hatter,* 532 U.S. 557 (2001), the Supreme Court declared unconstitutional a Social Security tax because it "effectively singled out then-sitting judges for unfavorable treatment" as compared to virtually all other federal employees. *Id.* at 561; *see also id.* at 576-77. The judges of New York have been similarly singled out for unfavorable treatment, as compared to virtually all other State employees whose purchasing power has been protected. State legislators, who can and do earn outside income, are not in the same category as judges and other full-time State employees. There is no principled difference between this case and *Hatter*. The discriminatory treatment inflicted on the judges of this State over the last decade violates the Compensation Clause.

Third, we allege that by holding judicial pay increases hostage to their own self-interests they have violated the separation of powers and the independence of the Judiciary. As Your Honor recognized in *Larabee*, the judiciary "has been caught in the crossfire between the executive and the legislature . . . . While clearly the legislative process involves tradeoffs and compromises on a myriad of political issues, to continue to deprive the third, supposedly co-

equal, branch of government with a pay adjustment, on which there is no policy dispute, for nearly a decade does raise an issue as to whether the two other branches have abused their power, and thus unconstitutionally interfered with the independence of the judiciary." *Larabee et al.* v. *Spitzer et al.*, 850 N.Y.S.2d 885, 890, 19 Misc. 3d 226, 233 (N.Y. Sup. Ct. N.Y. Co. 2008).

THE NEED FOR AN IMMEDIATE TRIAL

At the preliminary conference, we will ask the Court to schedule a trial of all issues to commence on or about May 14, 2008. A prompt trial is needed because the judicial-pay impasse has risen to the level of a constitutional crisis. New York's judges have lost more than a quarter of their salaries to inflation in the last decade, leaving them among the worst-paid judges in the Nation — 49th out of the 50 states, to be exact. The consequent financial hardship already has forced some judges to resign prematurely; other resignations may occur unless there is a pay increase. Judicial morale is rapidly diminishing, making it difficult to implement initiatives to address growing caseloads and other problems faced by the judicial system. The day-to-day functioning of the courts will inevitably suffer. The executive and legislative branches themselves have recognized that their failure to increase judicial salaries has created a serious problem for our State. But rather than act, they have insisted upon holding judicial pay increases hostage to unrelated issues, all in violation of the State Constitution.

A trial is the appropriate means to resolve the issues raised by this suit. Chief Judge Kaye and other judges must be allowed to testify about the effects of the judicial pay freeze, not only on judges' personal finances, but also on their ability to function as members of a branch of government that is supposed to be independent and co-equal. And the defendants themselves — the leaders of the Legislature and the Executive — must be made to explain in open court their repeated failures, their outright refusals, to fulfill their constitutional duties. They must be made to explain their insistence that judicial pay increases (which all agree are warranted) be held hostage to the desire of legislators to increase their own salaries, or the desire of the Executive to push through other initiatives resisted by the Legislature. We will prove at trial that legislators can and do earn outside income — in some cases, as we will show, substantial amounts. Legislators, as stated above, are not in the same position as judges and to

hold judicial salaries hostage to legislative salaries poses a very serious threat to judicial independence that the State Constitution guarantees.

THERE IS NO EXECUTIVE OR LEGISLATIVE IMMUNITY WHEN ONE CO-EQUAL BRANCH OF GOVERNMENT, THE JUDICIARY, SUES THE OTHER TWO FOR UNDERMINING ITS CONSTITUTIONALLY GUARANTEED INDEPENDENCE

Our claims are brought against the State of New York and the Legislature, as well as against Speaker Silver, Senator Bruno, and the new Governor, David Paterson, in their official capacities. We are mindful that Your Honor held in *Larabee* that then-Governor Spitzer could not be sued for exercising a "legislative function." We nonetheless believe, for the following reasons (which are explored at greater length in the accompanying memorandum of law), that the Governor and the leaders of the Legislature are proper parties in this suit and can be called to testify.

First, in contrast with *Larabee* — which involved claims raised by individual plaintiffs — this Complaint is brought by Chief Judge Kaye on behalf of the judicial branch itself and by the Unified Court System, *i.e.*, by a co-equal branch of government. The sphere of legitimate legislative activity protected by the State Constitution's Speech or Debate Clause has never been construed to immunize one branch of government from a claim brought by another branch, in this case the independent Judiciary. In *Office of the Governor* v. *Select Committee of Inquiry*, 858 A.2d 709, 726 (Conn. 2004), there was a clash between the executive and legislative branches, and the Connecticut Supreme Court stated in response to a claim of legislative immunity based on the Speech or Debate Clause: "[H]ere, 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." In that case, the court deemed adverse precedent to be "distinguishable" precisely "because it involved a claim raised by a private party." *Id.**

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* In another case now pending before this Court concerning a dispute between the Executive and Legislature — involving the scope of the Legislature's investigatory power — the Office of the Governor conceded

(footnote continued)

Second, the United States Supreme Court has applied a "practical rather than a strictly literal reading" of the Speech or Debate Clause. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 124 (1979). It has ruled that legislators' contact with and efforts to influence the executive branch are "not protected legislative activity." *Gravel* v. *United States,* 408 U.S. 606, 625 (1972). The contact between the Legislature and the Executive in our case, which has resulted in judicial salaries being held hostage to other unrelated issues, is not protected legislative activity. It is not protected by the Speech or Debate Clause.

Third, even if the conduct of defendants is considered legislative activity, the Speech or Debate Clause has never been construed to bar a claim based on the separation-of-powers principle that forms the foundation of the State Constitution and guarantees the independence of the Judiciary — especially a separation-of-powers claim brought, as stated above, by a co-equal branch of government. As the Supreme Court stated in *United States* v. *Brewster*: "Our speech or debate privilege was designed to preserve legislative independence, not supremacy. *Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.*" 408 U.S. 501, 508 (1972) (emphasis added). In *Pennsylvania State Association of County Commissioners* v. *Commonwealth*, there was a dispute over whether the Legislature was providing adequate judicial funding, and the Pennsylvania Supreme Court stated: "[A]t 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." 681 A.2d 699, 703 (Pa. 1996).

Fourth, the nature of the relief distinguishes our action from *Larabee*. In addition to declaratory relief, our Complaint seeks an order compelling the State to remit fixed relief to

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(footnote continued)
the appropriateness of prompt judicial resolution when the branches clash: "[T]he availability of judicial review is of heightened importance in disputes that implicate the separation of powers doctrine and the proper allocation of government power." Mem. of Law in Opposition to Respondent's Motion to Strike Affidavit of Senator Thomas K. Duane at 5, Office of the Governor of the State of New York v. George H. Winner, Jr., Index No. 406848/07.

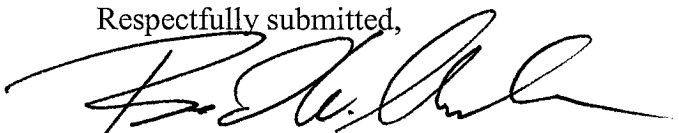
judges — $169,300, the amount currently paid to United States District Judges, an amount repeatedly recognized as appropriate by the Executive and the Legislature. The order we seek does not require the Legislature to vote on, or the Governor to sign, any particular legislative enactment. It does not require an exercise of the "legislative function." And there can be no doubt that if this Court finds a constitutional violation, it can remedy that violation by ordering the State to make appropriate payments. As the Supreme Court of Pennsylvania stated almost two decades ago:

> Although the legislative branch of our government has the power and authority to set the salary scale for the judiciary, as a co-equal branch of our tripartite form of government, the "[j]udiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities. . . ." *Commonwealth ex rel. Carroll* v. *Tate*, 442 Pa. at 52, 274 A.2d at 197 (emphasis in original). Therefore, it follows that this Court has the inherent power to ensure the proper functioning of the judiciary by ordering the executive branch of government to provide appropriate funding so that the people's right to an efficient and independent judiciary is upheld.

Goodheart v. *Casey*, 555 A.2d 1210, 1212 (Pa. 1989) (internal citation omitted); *see also Jorgensen* v. *Blagojevich*, 811 N.E.2d 652 (Ill. 2004)).

We are available at the Court's earliest convenience.

Respectfully submitted,



Bernard W. Nussbaum

cc: Joel Graber, Esq.,
Office of the New York State Attorney General