

STATE OF NEW YORK SUPREME COURT
COUNTY OF ALBANY

EDWARD A. MARON, ARTHUR SCHACK, AND
JOSEPH A. DeMARO,

Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

Index No. 4108-07

-against-

Hon. Thomas J. McNamara
Acting Justice

SHELDON SILVER, as Speaker of the New York
State Assembly, NEW YORK STATE ASSEMBLY,
JOSEPH BRUNO, as the Temporary President of the
New York State Senate, NEW YORK STATE
SENATE, ELIOT SPITZER, as Governor of the State
of New York, THOMAS DINAPOLI, as the
Comptroller of the State of New York, and the
OFFICE OF COURT ADMINISTRATION,

Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF MOVING RESPONDENTS'
APPLICATION TO DISMISS THE PROCEEDING ENTIRELY**

ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for Respondents Silver, Assembly,
Bruno, Senate, Spitzer and DiNapoli
The Capitol
Albany, NY 12224

JAMES B. MCGOWAN
ROGER KINSEY
CHRISTINA L. ROBERTS-RYBA
Assistant Attorneys General, of Counsel
Telephone: (518) 474-7642

Date: July 12, 2007

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Preliminary Statement

The New York State Constitution unambiguously gives the power to determine judicial compensation to the Legislature and the Executive. Thus, no matter how desirable judicial pay raises might be, the State Constitution reserves to the policy-making branches the determination whether pay raises are to be granted. As the Court of Appeals recently reiterated in Campaign for Fiscal Equity, Inc. v. State of New York (8 NY3d 14, 28-29 [2006]), the Judiciary must not usurp the budgetary prerogatives of the legislative and executive branches, as the policy branches are in a far better position to determine funding needs throughout the State and to set priorities for the allocation of the State's resources. See id.

Petitioners/Plaintiffs (hereinafter "Petitioners") are the Hon. Edward J. Maron, a Nassau County District Court Judge, and two New York State Supreme Court Justices, the Hon. Arthur Schack and the Hon. Joseph A. Demaro. They have styled their pleading as a combination CPLR article 78 proceeding and declaratory judgment action, captioning it as an Amended Petition. As an article 78 proceeding, the Amended Petition seeks to compel the State Comptroller to disburse raises alleged to have been awarded in Chapter 51, §2 of the Laws of 2006, and to compel other respondents to maintain judicial salaries consistent with inflation and the cost of living. Amended Petition ("Am. Pet.") First and Second Causes of Action. As a request for declaratory relief, the Amended Petition asserts that the State Constitution's delegation of authority to the policy branches to establish salaries for the Judiciary in some way constitutes an unconstitutional delegation as applied to petitioners. Am. Pet. Third Cause of Action. Petitioners seek a declaratory judgment that would declare they have a "fundamental right of maintaining the integrity" of their salary and compensation. Am. Pet. Fourth Cause of Action. In their Fifth Cause of Action, petitioners seek a judgment which declares that a failure to maintain judicial salaries apace with inflation and the cost

of living violates article VI, §25(a) of the State Constitution. Finally, petitioners assert that they are entitled to a judgment which declares the medical, dental, pharmaceutical, optical and hospitalization coverage, and co-pays offered them by the State may not change during their terms of office. Am. Pet. Sixth Cause of Action.

Movants are the Speaker of the New York State Assembly, the Assembly, the Temporary President of the New York State Senate, the Senate, Governor Spitzer and the State Comptroller.¹ They move to dismiss the Amended Petition in its entirety asserting that petitioners have failed to state a claim pursuant to article 78 of the CPLR because mandamus does not lie to compel the performance of discretionary duties and there is no clear legal right to the relief sought. Moreover, petitioners have failed to state a claim for declaratory relief, have failed to comply with the statute of limitations, and have failed to join necessary parties. In addition, Movants Silver, Bruno, Assembly, Senate and Spitzer move to dismiss the petition in its entirety as against them on the ground that they are absolutely immune under the protections afforded those charged with legislating as provided in the Speech and Debate Clause.

For all the reasons set forth herein, movants are entitled to a judgment now dismissing the petitioners' pleading in its entirety.

Constitutional and Statutory Background

As noted in United States v. Will (449 U.S. 200, 218 [1980]), for over three centuries, Anglo-American tradition has protected the judiciary in both its tenure and compensation. One of the

¹ The Office of Court Administration appears separately and has answered, noting that the petitioners have failed to join a necessary party. We speak of the collective parties represented by the Office of the Attorney General as "movants" herein.

grievances asserted against the King in the Declaration of Independence was that “[h]e has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” Id. As a result, the United States Constitution provides in article III, §1:

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The framers first considered adopting language stating that Congress could neither increase nor decrease the compensation of judges, but concluded that “the Congress should be at liberty to raise salaries to meet such contingencies as inflation, a phenomenon known in that day as it is in ours.” See Will, 449 U.S. at 219. Madison wanted to retain the ban on pay increases, for fear that judges might tend to defer unduly to the Congress in the hope of obtaining them. Will, 449 U.S. at 219.

Hamilton, however, explained the need to permit pay increases:

It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation [of judges] in the Constitution inadmissible. What might be extravagant to-day might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse.

The Federalist No. 79, pp. 491-492 (1818), quoted in Will, 449 U.S. at 220. The federal Compensation Clause therefore entirely reserved discretion in Congress to increase salaries, while prohibiting diminishment alone. In addition to promoting judicial independence, the Compensation Clause ensures judicial candidates that in abandoning private practice, more often than not more lucrative than the bench, the compensation of the new post will not diminish, ensuring the quality of justice by attracting able lawyers to the bench. Will, 449 U.S. at 220, citing Evans v. Gore, 253 U.S. 245, 253 (1920).

New York's constitutional history reveals the same concerns. New York's Constitution consistently prohibited diminishment in judicial compensation during judicial terms, but it alternated between prohibiting and permitting increases. When New York first adopted a Compensation Clause, in 1846, the clause prohibited both increases and decreases in judicial compensation. The Third Constitution provided in article I, §7:

The judges of the court of appeals and justices of the supreme court shall severally receive, at stated times, for their services, a compensation to be established by law, which shall not be increased or diminished during their continuance in office.

In 1869, a new Judiciary article was adopted which prohibited decreases only and allowed increases. It provided in article VI, § 14:

[The] judges and justices hereinbefore mentioned shall receive for their services a compensation to be established by law, which shall not be diminished during their official terms

In 1894, the Fourth State Constitution was adopted and it again prohibited both increases and decreases. It provided in article VI, §12:

The judges and justices hereinbefore mentioned shall receive for their services a compensation established by law, which shall not be increased or diminished during their official terms, except as provided in section five of this article.

In 1909, the State Constitution provided fixed, specific amounts for the compensation of judges in various titles, removing the discretion of the Legislature in that regard in its entirety, as provided in article VI, § 12:

Each Justice of the Supreme Court shall receive from the State the sum of ten thousand dollars per year. Those assigned to the Appellate Divisions in the third and fourth departments shall each receive in addition the sum of two thousand dollars, and the Presiding Justice thereof the sum of two thousand five hundred dollars per year. Those Justices elected in the first and second judicial departments shall continue to receive from their respective cities, counties or districts, as now provided by law, such additional compensation

as will make their aggregate compensation what they are now receiving. Those Justices elected in any judicial department other than the first or second, and assigned to the Appellate Divisions of the first or second departments shall, while so assigned, receive from those departments respectively, as now provided by law, such additional sum as is paid to the Justices of those departments. A Justice elected in the third or fourth department assigned by the Appellate Division or designated by the Governor to hold a trial or special term in a judicial district other than that in which he is elected shall receive in addition ten dollars per day for expenses while actually so engaged in holding such term, which shall be paid by the State and charged upon the judicial district where the service is rendered. The compensation herein provided shall be in lieu of and shall exclude all other compensation and allowance to said Justice for expenses of every kind and nature whatsoever. The provisions of this section shall apply to the Judges and Justices now in office and to those hereafter elected.

These fixed salaries remained in place for more than 15 years.

In 1925, the Constitution was amended, and the Judicial Compensation Clause took the form it has today. See, Carter, *New York State Constitution: Sources of Legislative Intent*, p. 79 (2d ed). The Clause, now found in article VI, §25(a) of the State Constitution,² provides, in pertinent part:

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 established pursuant to section fifteen of this article, 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.

Under the umbrella of this Compensation Clause the Legislature adopted a new article 7-B of the Judiciary Law in chapter 55 of the Laws of 1979 which provided for new and

² In passing, article 13, §7 of the State Constitution provides that State officers named therein, including movants, for example, shall during their term of office “receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he or she shall have been elected or appointed”

retroactive raises for the judiciary. Since 1979, the Legislature has provided increases in judicial pay on five occasions. See L 1980, ch 881; L 1984, ch 986; L 1987, ch 263; L 1993, ch. 60; and L. 1998, ch. 630. These laws variously provided for retroactive increases and prospective increases, giving raises that ranged from 5% to as much as 27%, the most recent providing for a 21% increase for all judges. On one occasion, in 1993, the Legislature provided judicial raises while making no provision for raises for other state officers; on each of the other occasions, the Legislature provided raises for both the Judiciary and the Legislature.

In 2006, the following provision was enacted as part of Section 2 of chapter 51 of the Laws of 2006, which authorized over \$1.6 billion for the Judiciary in that fiscal year:

JUDICIAL COMPENSATION REFORM

JUDICIAL COMPENSATION REFORM 69,500,000

General Fund /s State Operations
State Purposes Account - 003

For expenses necessary to fund adjustments in
the compensation of state-paid judges and
justices of the unified court system **pursuant
to a chapter of the laws of 2006** 69,500,000
Program account subtotal 69,500,000 [emphasis added].

See Maron Ex. F. Governor Pataki forwarded the Judiciary Budget proposal for fiscal year 2006-2007 as submitted by the Office of Court Administration as required by article VII, §1 of the State Constitution, with his notation that he has supported a judicial salary increase which would cost the State \$28,000,000, rather than the sum proposed by the Office of Court Administration. Maron Ex. E. There was no other enactment in 2006 addressing an adjustment of judicial compensation by the Legislature. Indeed, floor debates immediately

prior to the enactment of the budget bill made clear that the legislators intended and well understood that the \$69,500,000 authorized would not actually be disbursed unless and until additional legislation in the form of another chapter law in 2006 was adopted adjusting the Judiciary's salaries. See, e.g., Appendix A, Legislative Debate Upon Chapter 51, Senate Budget Bill No. 493, Assembly on Bill No. 9551-B:

Senator Schneiderman: In this budget for the judiciary, the judiciary has not received any pay increase since 1999. Does this legislation include any provision for a pay increase for the judiciary?

Senator Johnson [Chairman, Senate Finance Committee]: Well, there's is no legislation enacting a pay increase, but there is money in this budget available, \$69.5 million, subject to a chapter law we have yet to enact. Appendix A at pp. 3-4.

* * *

Mr. Hayes: One question, Mr. Farrell. I note that this budget contains an appropriation of \$69.5 million in anticipation of legislative action on judiciary salary reform; is that correct?

Mr. Farrell [Chair, Assembly Ways and Means]: Yes. Appendix A at p. 11.

Article 7-B of the Judiciary Law, setting forth the compensation of judges and justices of the Unified Court System, including that of petitioners, remains in effect as it was enacted in 1998. While the Legislature enacted Chapter 51 of the Laws of 2006, authorizing an appropriation to fund judicial salary increases should they be enacted, the Legislature did not enact any such increases. Therefore, as provided by Judiciary Law article 7-B, Justices of the Supreme Court continue to receive \$136,700 each year of their 14-year terms,(see NY Cons, art VI, §6[c]; Judiciary Law, § 221-b), while District Court Judges receive \$122,700 annually for each year of their 6-year terms (see NY Cons, art VI, §16[h]; Judiciary Law, §221-h). Court of Claims Judges receive \$136,700 for each year of their 9-year terms (see NY Cons,

art VI, § 9; Judiciary Law, §221-c). County Court Judges receive \$119,800 for each year of their 10-year terms (see NY Cons, art VI, §10[b]; Judiciary Law, §221-d). For the fiscal year 2007-2008, the Respondents Legislature and Governor have appropriated more than \$1.7 billion for judicial operations, including judicial salaries. See L 2007, ch 51, §2.

The Relevant Procedural History

On or about January 10, 2007, petitioners served the within Amended Notice of Petition and Amended Petition, originally returnable in Nassau County.³ Currently pending before the Court are two Orders to Show Cause previously presented by petitioners: 1) An Order to Show Cause dated January 8, 2007, signed by the Hon. Thomas A. Adams, which directs Respondent Office of Court Administration to show cause why it should not provide certain proposed ethical advice to all judges and justices in the State and directs Respondents Bruno and Silver to show cause why they need not provide certain proffered ethical advice to attorneys in the Legislature; and 2) An Order to Show Cause dated March 30, 2007, signed by the Hon. Thomas Feinman, directing respondents to show cause why a preliminary injunction should not be issued staying and enjoining the “reversion of the \$69,500,000 designated for judicial raises in the New York State Budget for the 2006-2007 Fiscal Year to the general fund” and related relief. The latter Order to Show Cause contained an ex parte temporary restraining order which ordered that “the \$69,500,000 designated for judicial raises

³ Any attempt to serve and proceed with an amended petition without prior leave of Court, as happened here, is questionable in light of the limitation in CPLR 7804(d) that the “court may permit such other pleadings as are authorized in an action upon such terms as it may specify,” and no such pleading is otherwise authorized in CPLR article 78. Movants, however, have no objection to treating the Amended Petition as the operative pleading and waive irregularities of service and notice of the Petition and Amended Petition in deference to petitioners, the importance of prompt resolution of the issues they intended to raise, and the convenience of the Court.

in the New York State Budget for the 2006-2007 Fiscal Year shall not revert to the general fund and shall remain segregated and designated for judicial raises.”

The movants at bar have previously responded to both of petitioners’ Orders to Show Cause. As to the January 8 Order to Show Cause, in papers served on January 11, 2007, movants noted that petitioners lack capacity and standing to compel the relief requested, lack any injury, and are misguided as to the ethical advice they seek to broadcast. As to the March 30 Order to Show Cause, movants earlier submitted a proposed Order to Show Cause which would compel petitioners to show why the ex parte temporary restraining order should not be vacated and have submitted the affidavit of New York State Division of the Budget Unit Head Louis A. Raffaele and Respondents’ Memorandum of Law in support of a motion to vacate the Order, which address the impropriety of an award of any injunctive relief to petitioners concerning the appropriations of 2006-2007. Movants rely on those previous submissions to address those orders to show cause. Nevertheless, insofar as the movants’ current application establishes a lack of merit to petitioners’ pleading in its entirety, petitioners’ requests for equitable relief in the orders to show cause must be denied for the reasons set forth herein as well.

By stipulation and order dated May 15, 2007, venue was transferred to Albany County and respondents were granted until July 15, 2007, to respond to the petition. Acting Justice McNamara subsequently directed that responses to the pleadings be made on or before July 12, 2007. Respondents Silver, Assembly, Bruno, Senate, Spitzer, and DiNapoli submit this Memorandum of Law in support of a motion to dismiss the Amended Petition upon objections in point of law, pursuant to CPLR 7804(f). Insofar as the Amended Petition is read to be a

plenary action, movants submit this Memorandum of Law in support of a pre-answer motion to dismiss pursuant to CPLR 3211(a)(2),(5), (7), and (10).

In these motions, we demonstrate that petitioners are not entitled to mandamus because they can point to no statutory command that movants have not fulfilled, petitioners having misread the appropriation authorization in Chapter 51 of the Laws of 2006 and being unable to point to any non-discretionary obligation imposed upon the movants which causes petitioners justiciable injury. In addition to addressing petitioners' statutory arguments, the movants address petitioners' constitutional claims. Movants note that because petitioners have failed to state facts which would meet their heavy burden to establish the compensation afforded the Judiciary under article 7-B is unconstitutional, petitioners' Amended Petition must be dismissed in its entirety. Finally, because of the protections afforded legislators and the Governor under the Speech and Debate Clause, movants seek an order dismissing the Amended Petition in its entirety as against those parties.

POINT I

Mandamus Is Unavailable in this Proceeding.

Petitioners seek a writ of mandamus pursuant to CPLR article 78 to compel respondents to enact or implement specific legislation granting a pay raise to the Judiciary. It is well settled that mandamus is an "extraordinary remedy" and is awarded "only in limited circumstances." Klostermann v. Cuomo, 61 NY2d 525, 553 (1984). The writ may issue only to compel the performance of a purely ministerial act where there is a "clear legal right" to the relief. It will not be awarded "to compel an act in respect to which the officer may

exercise judgment or discretion.” Id. at 539.

Though mandamus may direct a state agency to render a decision on a given question, it may not be used to compel an agency to decide the matter one way or another. See, e.g., Klostermann v. Cuomo, supra, 61 NY2d at 540 (mandamus will lie to compel a state officer to perform a legal duty, but will not issue to direct the officer how to perform the duty). As the court noted in Kupersmith v. Public Health Council, 63 NY2d 904, affg on opinion below, 101 AD2d 918 (3d Dept. 1984), “[w]hile mandamus may be available to compel a State agency to take action upon an application which involves a matter of discretion, it does not lie to compel the agency to act in a particular manner substantively favorable to the applicant.” See also United Methodist Retirement Community Development Corp. v. Axelrod, 110 AD2d 292, 294 (3d Dept. 1985) (mandamus will not lie to direct respondent how to perform a legal duty).

Petitioners have failed to show that they are entitled to any order from this Court that compels movants to do anything. A petitioner seeking mandamus to compel in an article 78 proceeding has an initial burden of presenting factual allegations of an evidentiary nature or other competent evidence tending to establish entitlement to the requested relief. Matter of Rodriguez v. Goord, 260 AD2d 736, 736-737 (Third Dept. 1999)(citing Matter of Malik v Berlinland, 158 AD2d 836 [Third Dept. 1990], lv denied 76 NY2d 704). Petitioners fail to show that by failing to adopt the legislation they seek, the legislative respondents or the Governor have failed to fulfill any constitutional or statutory mandate. The judicial compensation established by the policy branches is “established by law” as required by the Compensation Clause. There is no basis for petitioners’ claim that respondents must establish

a different compensation.

Petitioners have failed to point to any statutory command that respondents have not satisfied. As discussed below, their pleading, even if taken as true, fails to show that the State's provision of salaries as established in article 7-B of the Judiciary Law is constitutionally infirm. Where, as here, the petitioner has failed to allege facts that establish a clear legal entitlement to the extraordinary relief, respondents' pre-answer motion to dismiss is properly granted. Matter of Altamore v. Barrios-Paoli, 90 NY2d 378, 385 (1997). In the end, the Court must conclude that, however desirable it might be for the Judiciary to receive higher salaries, the Amended Petition fails to establish that the existing salary structure is statutorily or constitutionally infirm, and petitioners fail to point to any clear mandate that respondents have failed to fulfill in those regards.

A) Petitioners Are Not Entitled to Mandamus or Injunctive Relief with Respect to §2 of Chapter 51 of the Laws of 2006.

It is well settled that mandamus is available only when the petitioner can point to an obligation that the respondent is duty bound to perform and has not fulfilled (see Klostermann v. Cuomo, *supra*). Here, petitioners erroneously point to Chapter 51, §2 of the Laws of 2006 as a statutory command with which the State Comptroller has failed to comply. Petitioners misinterpret the meaning and effect of the Judiciary Budget adjustment authorization set forth in §2 of Chapter 51 of the Laws of 2006. The formulaic language in issue, “[f]or expenses necessary to fund adjustments in the compensation of state-paid judges and justices of the unified court system **pursuant to a chapter of the laws of 2006**” [emphasis added], expressly requires additional legislative action. The adjustments contemplated by that provision were simply never made. As the plain language of the

appropriation bill indicates, the monies were to be made available in the Budget in anticipation of adjustments in judicial compensation to be made in a subsequent chapter law in 2006. See, also Appendix A, Legislative Debate Upon Chapter 51. No such chapter was enacted.

Petitioners urge that the authorization “to fund adjustments in the compensation of state-paid judges and justices of the unified court system **pursuant to a chapter of the laws of 2006**” [emphasis added] should be read as if it constituted authorization to fund adjustments in compensation “adopted hereby.” They are mistaken. If the provision had been intended to effect an increase by itself, the Legislature would not have indicated that the adjustments were to be found in a chapter law. No other appropriation authorization in Chapter 51 contains that language.

It is a rudimentary principle of statutory construction that the Court, whenever possible, must give effect to all the language that the Legislature has employed. See, e.g., Ferrin v. New York State Dept. of Correctional Services, 71 NY2d 42, 47 (1987)(citing cases). Petitioners’ strained reading of the statute makes the phrase “pursuant to a chapter of the laws of 2006 ” meaningless surplusage, instead of giving the phrase its settled meaning. When the Legislature adopts a budgetary item which provides authorization to fund a proposal “pursuant to a chapter of the laws of [the current session],” it is ensuring that funding is authorized should the program envisioned come to fruition in separate legislation. That is exactly what occurred, for example, in prior Judicial Budget authorizations where raises were in fact enacted. See, e.g., chapters 51 and 55 of the Laws of 1979; chapters 55 and 60 of the Laws of 1993.

No pay raise has been authorized by the Legislature since the unification of the court system budget without express amendment of article 7-B of the Judiciary Law, which sets forth in detail the compensation of New York's judges and justices in each of their various titles. Petitioners' odd construction therefore, if adopted, would mean that by adopting the appropriation authorization in §2 of Chapter 51, the Legislature repealed article 7-B of the Judiciary Law by implication -- apparently replacing it with a completely undefined salary structure. Certainly nothing in the authorization indicates how the lump sum is to be divided.

Although petitioners argue that chapter 51 repealed article 7-B of the Judiciary Law, it is well established that a repeal by implication is not favored. See, GE Capital Corp. v. State Div. of Tax Appeals, 2 NY3d 249, 268 (2004) and cases cited. Absent clear evidence of legislative intent to repeal earlier legislation, the Court must make every effort to give full effect to both enactments. Id. There is not the slightest indication that the Legislature intended, without subsequent legislative action, to completely reform judicial pay in fiscal year 2006-2007, discarding the salary schedules in place since 1999 as set forth in article 7-B of the Judiciary Law. Indeed, Legislative debate on the bills firmly establishes that no one in the Legislature believed that this Budget Bill was, in fact, authorizing raises for the Judiciary. See, Appendix A, Legislative Debate Upon Chapter 51.

Moreover, petitioners' argument flies in the face of the State's constitutional mandate in article VI, §25(a) that compensation for judges in the unified court system be "established by law." Petitioners contend that the appropriation of \$69,500,000 established new judicial salaries, but in fact there is nothing in that provision that specifies the compensation of any judge. Petitioners' suggestion that this lump sum of \$69,500,000 was intended by the

Legislature to supplant the detailed and long-standing salary schedules in article 7-B of the Judiciary Law is not supported. Clearly the Legislature contemplated that future legislation would be enacted to establish the specific adjustments in compensation to be funded by the appropriated funds. Such legislation would be needed to determine whether the adjustments would be retroactive, who would get them, how much they would be for each type of judge and justice, whether a formula to address future inflation would be adopted and, if so, what the measure of inflation would be and how often it would be applied. No such legislation was ever enacted.

It follows, therefore, that the mere adoption of this appropriation does not establish a mandate that the State Comptroller must fulfill. Petitioners' effort to compel the State Comptroller to disburse the \$69,500,000 (see, Am. Pet. First Cause of Action) must fail because the appropriation merely made monies available for an event that never occurred, and created no duty for the State Comptroller to fulfill. In the absence of any clear and unequivocal legislative directive to dispense with the salary structure adopted in article 7-B of the Judiciary Law, the State Comptroller was authorized only to comply with the existing salary schedule. Petitioners have utterly failed to identify any nondiscretionary duty owed to them by the State Comptroller not fulfilled, and therefore they have failed to state a cause of action for mandamus to compel. See Matter of Altamore v. Barrios-Paoli, 90 NY2d 378, supra; Klostermann v. Cuomo, 61 NY2d 525, supra. Mandamus to compel a different payment scheme is inappropriate and a motion to dismiss it is properly granted. See Matter of Harper v. Angiolillo, 89 NY2d 761, 768 (1997).

B) Petitioners Point to No Other Statutory Command Respondents Have Not Fulfilled.

In their Second Cause of Action, petitioners assert that the movants “should be compelled to implement and comply with the enacted and stated policy of establishing and maintaining judicial salaries consistent with inflation and cost of living.” But petitioners have not and cannot identify such a policy in the Constitution and laws of the State of New York. One petitioner notes that the raise provided in 1999 was intended by a sponsor “to offset inflation.” Maron aff. ¶ 9, Ex. A. That memorandum, of course, is neither an enactment nor a declaration of State policy. At most it shows that the Legislature felt the last raise was justified by inflation. It does not indicate that future inflation compels raises. Such a justification of prior legislation provides petitioners no assistance herein. It does not constitute a clear, ministerial command which must be fulfilled by movants.

Moreover, even if the legislature had expressed an intention to adjust salaries to meet inflation, such a statement of intent would not constitute an enactment nor would it bind the legislature. As the United States Supreme Court has explained:

A paramount -- indeed, an indispensable -- ingredient of the concept of powers delegated to coequal branches is that each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches. To say that the Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress.

United States v. Will, 448 U.S. at 228. Petitioners’ Second Cause of Action must be dismissed in its entirety for failure to state a claim upon which relief may be granted by this Court.

POINT II

Petitioners Fail to State a Claim Establishing That Article 7-B of the Judiciary Law Is Unconstitutional; Section 25(a) of Article VI of the State Constitution Does Not Entitle Petitioners to Increases in Compensation.

In addition to their claim that State statutes mandate raises for them, petitioners make a variety of constitutional claims as a basis for seeking equitable relief. Those claims are equally meritless.

The standard of review for a motion to dismiss requires that the Court afford the petitioners' pleading a liberal construction, accept as true the allegations therein, accord the petitioners the benefit of every favorable inference, and determine whether the facts fit within any cognizable legal theory. See 1455 Washington Ave. Assoc. v. Rose & Kiernan, Inc., 260 AD2d 770, 771 (1999). The Court, of course, need not accept as true legal conclusions or factual allegations that are inherently incredible or flatly contradicted by documentary evidence. Id. Similarly, the Court should not consider inadmissible and unsworn evidence upon a motion to dismiss. Curry v. D'Onofrio, 29 AD3d 727 (Second Dept. 2006).

Insofar as petitioners urge that the compensation schedule established by the Legislature for judicial salaries as set forth in article 7-B of the Judiciary Law has somehow become unconstitutional, petitioners' burden is to come forward with factual allegations in their petition which will overcome the settled rule that a presumption of constitutionality attaches to Judiciary Law article 7-B, just as it does to every legislative enactment. See, e.g., Wolpoff v. Cuomo, 80 NY2d 70, 78 (1992); In re Fay, 291 N.Y. 198, 207 (1943). Moreover, petitioners' burden on such a claim is to establish that the statutory scheme is unconstitutional beyond reasonable doubt. Id.

Petitioners claim that their salary schedule has been unconstitutionally diminished as a result of the gradual effects of inflation over time. They are mistaken. The Compensation Clause does not guarantee that the salary of a judge will retain the same buying power over time, despite fluctuations in prices that are entirely extrinsic to the legislative process. Instead, the Clause prohibits the diminution of judicial salaries by the government. Inflation is not a pay cut for judges prohibited within the meaning of the Compensation Clause. The petitioners have wholly failed to allege facts which show that the Constitution is violated by the maintenance of judicial compensation in accordance with the salary schedules the Legislature has adopted in Judiciary Law article 7-B. A fortiori they have failed to satisfy the burden of showing such a violation beyond a reasonable doubt, the burden they must satisfy upon such a claim. See Wolpoff v. Cuomo, 80 NY2d 70, supra; In re Fay, 291 N.Y. 198, supra. Similarly, there is nothing in the appropriation of more than \$1.7 billion for the needs of the Judiciary in fiscal year 2007-2008 that provides even the slightest hint that the policy branches have abrogated any duty to the Judiciary. Petitioners simply have not pleaded facts which, even if accepted as true, could establish that the existing statutory scheme of compensating judges and justices is unconstitutional beyond reasonable doubt.⁴ Therefore,

⁴ The Amici assert that the “coequal branches of government have so underfunded the Judicial Branch that they have encroached on the Judiciary’s jurisdiction by rendering it incapable of fulfilling its constitutional and statutory duties.” Amici Brief, p. 5. There are, however, no facts alleged in the Amended Petition which support such a claim. The State has authorized \$1.7 billion for the Judiciary in fiscal year 2007-2008. The matter sub judice, therefore, is in no way similar to Matter of McCoy v Mayor of City of N. Y. (73 Misc 2d 508, mod on other grounds 41 AD2d 929), which the Amici cite, where respondents had unlawfully refused to appropriate any funds for the operation of a new housing court. Rather, as was the case in Matter of Blyn v. Bartlett (50 AD2d 442, 449 [Third Dept. 1976], affd. 39 NY2d 349), where the issue is the mere quantity of allotment, the Third Department held that the final determination appropriately rests with legislative officials and no separation of powers violation is implicated.

the petition must be dismissed on its face.

The specific State Constitutional provision that petitioners rely upon to challenge the constitutionality of article 7-B of the Judiciary Law provides no support for their claim.

Article VI, section 25(a) provides, in pertinent part:

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 established pursuant to section fifteen of this article, 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. . . .

Petitioners urge that the constitutional mandate which expressly grants the Legislature and the Executive alone authority to establish judicial compensation, limited only by a prohibition against diminishing compensation of a judge in a term, is violated by a failure of the Legislature to propose and the Governor to accept an increase in judicial salaries. The petitioners' claims are refuted by the history of Compensation Clauses generally, New York State's constitutional history in particular, and the plain language of the cited provision.

State and federal constitutional histories do not provide any support for the contention that prohibitions against diminishment in compensation in Compensation Clauses were intended to mandate legislative increases for inflation. As discussed in detail above, the federal Constitutional Convention considered a ban on increases to be entirely consistent with the ban on decreases: the Convention originally considered a ban on increases of judicial salary while judges were in office, and then rejected it because "the Congress should be at liberty to raise salaries to meet such contingencies as inflation, a phenomenon known in that day as it is in ours." United States v. Will, 449 U.S. at 219, supra. In the Federalist No. 79, Hamilton explained that the prohibition against increases was dropped because it was

“necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances.” Will, 449 U.S. at 220. Far from intending to mandate that judicial compensation be periodically increased, the Compensation Clause was viewed as an investiture of discretion in the Legislature to increase salaries if and when it saw fit.

Moreover, the federal appellate courts have repeatedly recognized that there is no mandate within the federal Compensation Clause that Congress account for the effects of inflation on judicial compensation. In Will, the Supreme Court addressed whether the Compensation Clause was offended when scheduled cost-of-living increases for the federal judiciary, included in a complicated salary adjustment matrix, were interdicted by Congress. The Court found that where a judicial pay increase had commenced earlier in the day, the Compensation Clause prevents the President from effectively signing a bill revoking the same even hours later. Will, 449 U.S. at 225-226. However, the Court noted that it was entirely permissible for the Congress to stop other cost-of-living increases that were scheduled to take place in the remainder of the four-years of the quadrennial review because those had not yet vested in the Judiciary as part of their compensation. The Court noted:

Our discussion of the Framers’ debates over the Compensation Clause, supra, at 219-220, led to a conclusion that the Compensation Clause does not erect an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges. . . . Rather, that provision embodies a clear rule prohibiting decreases but allowing increases, a practical balancing by the Framers of the need to increase compensation to meet economic changes, such as substantial inflation, against the need for judges to be free from undue congressional influence. The Constitution delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand.

Will, 449 U.S. at 227 (footnote omitted). The Court noted that as Congress had the discretion to award periodic increases in judicial compensation, it had the power to revoke the same as

long as those increases in pay had not actually vested as part of judicial salary. The Court declared that in “no sense” did the termination of scheduled cost of living increases for judges diminish the compensation of judges or violate the Compensation Clause. *Id.* at 228. The Court noted that as the framers of the Constitution necessarily rejected an indexing scheme, it would be particularly ironic if the judiciary were to bind Congress to one. *Id.* at n. 33. Petitioners’ proposal here is nothing more than imposition of such an indexing scheme.

Similarly, in *Williams v. United States* (240 F3d 1019 [Fed. Cir. 2001]), the Federal Circuit found that the Compensation Clause was not violated when Congress interdicted the cost of living raises scheduled for federal judges in each of the years 1995, 1996, 1997 and 1999. The conclusion of the Circuit Court is particularly insightful with respect to the issues before this Court:

It is, of course, profoundly disappointing to the Judges that the arrangement for future federal judicial pay increases . . . has enjoyed such an inconsistent life. While we agree with the Judges' view that the continued strength of the federal judiciary depends in part upon a deliberate, consistent, and fair approach to routine cost-of-living salary adjustments, we cannot, consistent with established Article III principles, hold that the Constitution requires the Judges to prevail in this case.

New York’s constitutional history similarly demonstrates that the ban on diminution of judicial salaries was understood to be consistent with either prohibiting or permitting judicial salary increases. Indeed, through much of New York’s history the state Constitution has expressly prohibited increases in judicial pay during a term in office. As noted above, the State’s Third Constitution, in 1846, prohibited both the diminishment and increase of judicial pay in article I, §7. While the State Constitution in 1869 temporarily deleted the “be increased” prohibition in its article VI, § 14, in 1894, the Fourth State Constitution in article

VI, § 12, again prohibited both an increase and diminishment of compensation during a judge's term. Moreover, starting in 1909, salaries for judges in various titles were fixed by the Constitution itself, in article VI, § 12, at specific sums where they necessarily remained without legislative or judicial interference until the 1925 amendment to the State Constitution, which adopted the phraseology which exists today. See, Carter, New York State Constitution: Sources of Legislative Intent, p. 79 (2d ed). In light of this history, petitioners have an enormous burden to overcome when they assert that the judiciary is entitled to constitutional relief from the effects of inflation.

Petitioners' assertions would turn the State's constitutional history and State's Constitutional provision on their heads. The State Constitution vests the power to determine judicial compensation in the Legislature and the Executive by declaring that judicial compensation shall be "established by law" in section 25(a) of article VI. The constitutional prohibition against diminishment in compensation during a term in office simply cannot be construed as an affirmative mandate that the Legislature and the People of the State increase judicial compensation to overcome effects of the market place. The cases petitioners cite do not provide otherwise. For example, in Matter of Kelch v. Town Board of the Town of Town of Davenport (36 AD3d 1110 [Third Dept 2007]) the Court was confronted with an instance where, after a candidate was elected as a Town Justice, the Town Board raised the salary of the Justice already serving from \$5,000 to \$7,500, and set the salary the newly elected petitioner, who was scheduled to occupy a post which respondent had intended to eliminate, at \$500. The Court found that such a reduction by the legislative body to a salary that was less than the minimum wage was an "abuse of its power on a constitutional level." Here,

unlike the situation in Kelch, the respondents have done nothing to reduce petitioners' salaries and they remain at the highest levels they have ever been. There is not the slightest allegation that the respondents intend to eliminate any of the petitioners' positions. That article 7-B of the Judiciary Law continues to remain in effect and provides for salaries of \$136,700 and \$122,700 for petitioners can hardly be characterized as an "abuse of [legislative] power on a constitutional level." The unusual and rare circumstances in Matter of Kelch simply do not apply.

Atkins v. United States, 556 F2d 1028 (U.S. Ct. Cl. 1997), cited by petitioners, provides no support for their claim. Atkins holds unsurprisingly that discriminatory conduct towards judges leading to a real diminishment in compensation is prohibited by the Compensation Clause. In Atkins, petitioners urged that the failure of Congress to afford salary increases to judges in the period March 15, 1969, to October 1, 1975, violated the Compensation Clause in that the "real value" of the dollar as measured by the Consumer Price Index had decreased. 556 F2d at 1033. The Court granted defendants' motion to dismiss the claim, however, as the Compensation Clause affords no protection from indirect and nondiscriminatory effects of inflation on judicial salaries. The Court found such nondiscriminatory decline in the purchasing power of salary, absent detailed evidence demonstrating an assault upon the independence of judges, is simply not prohibited by the Constitution. Atkins emphasizes that conclusory allegations concerning generalized inflation like those posed by petitioners here, coupled with no evidence of mass departures from the bench and no real evidence of a discriminatory impact, particularly in light of the allegations of linkage of judiciary raises to legislative raises, are simply insufficient to trigger the

protections of the clause.

Accordingly, respondents have not violated article VI, section 25(a) of the State Constitution by failing to provide for an increase in salary for the judiciary. To the contrary, the Legislature has fulfilled its constitutional duty by having provided a salary schedule in the Judiciary Law and by undertaking no acts diminish such salaries.

POINT III

**Changes in Insurance Offered the Judiciary Do Not
Violate Article VI, Section 25(a) of the State Constitution;
Petitioners Failed to Satisfy the Statute of Limitations
and to Join Necessary Parties.**

Petitioners rightly recognize that no case in New York has addressed an assertion that health insurance falls within the scope of the State Constitution's Compensation Clause. See Petitioners' Memorandum in Support of Am. Pet. p. 42. For several reasons, this Court must decline petitioners' invitation to be the first court to do so.

First, the array of insurance coverages offered to judges for purchase or participation does not constitute "compensation" within the meaning of the Compensation Clause of the New York State Constitution, and a change in that array of insurance coverages is thus not a diminution of compensation. The insurance coverages at issue are made available to judges pursuant to New York Civil Service Law § 163, which provides that all persons in the service of the State, whether elected, appointed or hired, may elect to participate in a state health insurance plan by purchasing insurance. While employer subsidies for such insurance coverage may, in other contexts, be considered "compensation," petitioners have failed to establish that the term "compensation" as used in the State's Compensation Clause is used so

expansively.

Insofar as petitioners complain of unspecified increases in co-payments for insurance that they purchase, the mere increase in the price of what they choose to purchase is not evidence of a diminishment in compensation. When the cost of buying insurance rises, the employee's compensation is not thereby diminished. That there are generalized, indirect and nondiscriminatory price increases in the market place is no evidence of a diminishment in compensation within the meaning of the Compensation Clause. See, e.g., Atkins, 556 F2d 1028, supra.

Courts have consistently rejected the claim that the Compensation Clause prevents the government from increasing the fees or costs payable by judges. For example, in Sweeney v. Cannon (23 AD2d 1 [Second Dept. 1965], mod. on other grnds, 30 NY2d 633), the court rejected the argument that judges should be exempt from a statute requiring payment for lawyer registration because it diminished their compensation in violation of the New York State Constitution. The Court noted that “the statute does not purport to do anything to their salaries as Judges, but treats with them in their capacities as attorneys. . . . One might as well say that if a Judge needs a car to get to work, his car license fee could not be changed while he was in office.” Id. 23 AD2d at 9.

Similarly, in Black v. Graves (257 A.D. 176, 181 [Third Dept. 1939], affd. 281 NY 792), the Third Department rejected a claim that the general imposition of income taxes on judges was an attempt to attack their independence, and stated that such a claim was “too ethereal and speculative and consequently too unsubstantial to form the basis for an implication of tax immunity.” Petitioners stand on no firmer footing when they suggest that

changes in co-pays and routine modifications in insurance coverages for all employees demonstrate an assault on the independence of the judiciary prohibited by the State Constitution's Compensation Clause.

Even if one were to assume that compensation, within the meaning of the Compensation Clause, encompassed insurance coverage, the compensation in question would be the amounts paid by the State to or on behalf of petitioners, not the amounts paid by the petitioners as premiums or copayments. The petitioners have not asserted any facts which show that the State's contribution towards the insurance coverages made available to them has in any way decreased, and for that reason alone they have not alleged any decrease in compensation.

In addition, there are procedural impediments to petitioners' claims concerning changes in insurance coverage. CPLR 1001 requires joinder of persons who ought to be parties if complete relief is to be accorded or who might be inequitably affected by a judgment. But the actual benefits made available and the co-pays to be paid are all determined by persons who are not parties to this proceeding. The President of the Civil Service Commission has general responsibilities to make general coverage available (see Civil Service Law § 160 et seq.), and the specifics are periodically determined by the Health Insurance Council, consisting of the President of the Civil Service Commission, the Director of the Budget, and the Director of Employee Relations (see Civil Service Law § 161-a). These non-parties are responsible for the determinations petitioners complain about, and the respondents are not responsible for the petitioners' related grievances.

Moreover, petitioners' challenges to determinations concerning co-pays and changes

in health plan options available to them are time-barred. These determinations were last established as of January 1, 2005. See Affidavit of Christine Williams, Assistant Director for Benefits Administration of the Employee Benefits Division of the New York State Department of Civil Service. The four-month time limit for judicial review of those determinations has long expired. See CPLR 217. As Ms. Williams explains, the State purchased insurance contracts providing the coverage of which petitioners now complain a number of years ago. The State has changed its position to its detriment based upon the petitioners' failure to promptly object. See Williams aff. Accordingly, petitioners' cause of action seeking review of determinations establishing the insurance coverages available to them must be dismissed on the basis of laches and pursuant to CPLR 7804(f) and CPLR 3211(a)(5).

POINT IV

Petitioners Do Not State a Claim for an Equal Protection Violation.

In their fourth cause of action against respondents Silver, Bruno and the Legislature, petitioners assert a vague claim that their equal protection rights have been violated. The petition fails to allege that the legislative respondents have treated petitioners differently from others similarly situated with respect to salary increases, and thus fails to state a claim for an equal protection violation. The fourth cause of action should therefore be dismissed.

The petition contends that respondents, by linking judicial pay raises to legislative pay raises, have "rendered the judiciary to be a suspect class" and have denied petitioners their "fundamental right of maintaining the integrity" of their salary and compensation in violation of their equal protection rights. Am. Pet., ¶¶ 45-50. Petitioners also argue that there is no

legitimate state interest in depriving the judiciary of its constitutional right to have its salary and income undiminished by inflation and increases in the cost of living. Id., ¶ 52.

As a threshold matter, it is difficult to discern the target of petitioners' equal protection claim. They do not identify any administrative or statutory classification, or any rule or formal policy adopted by any of the respondents that discriminates against them or has had a disparate impact on them with respect to salary increases. Read broadly, the petition may be alleging that the Legislature's failure to take action to amend Judiciary Law article 7-B to increase judicial salaries to keep pace with inflation amounts to an equal protection violation. But this argument fails because petitioners have not alleged the requisite disparate treatment. See Atkins, 556 F2d at 1056.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." Hernandez v. Robles, 7 NY3d 338, 375 (2006) (Graffeo, J., concurring), (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)). "A violation of equal protection arises where first, a person (compared with others similarly situated) is selectively treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Bower Assocs. v. Town of Pleasant Valley, 2 NY3d 617, 631 (2004).

Petitioners do not identify any similarly situated person or group who has received favored treatment from the Legislature with respect to salary increases. They contend that the Legislature has a historic practice of linking legislative pay raises to judicial ones, but this alleged practice does not result in disparate treatment of petitioners.

Petitioners also point out that unlike the Legislature, the Judiciary is prohibited from earning all but very limited outside income. Am. Pet., ¶ 51. But the prohibitions they refer to are found in Canon 4 of the Code of Judicial Conduct adopted by the New York State Bar Association, the rules of the various Appellate Divisions of the Supreme Court, to the extent the Canons are incorporated therein, and the Rules of Judicial Conduct promulgated by the Chief Administrator of the Courts and approved by the Court of Appeals. See 22 NYCRR §100.4. None of these prohibitions was enacted by the Legislature. These prohibitions therefore do not provide any basis for an equal protection claim against the legislative respondents, who are the only parties named in petitioners' equal protection cause of action.

In sum, absent any allegation of disparate treatment by respondents, petitioners fail to state a claim under the equal protection clause.

Even assuming for the sake of argument that petitioners' allegations can be interpreted to allege disparate treatment with respect to their salary increases, rational basis scrutiny would apply because the judiciary is not a suspect class and there is no fundamental right to salary increases that keep pace with inflation.

Under both the state and federal constitutions, "where a governmental classification is not based on an inherently suspect characteristic and does not impermissibly interfere with the exercise of a fundamental right, it need only rationally further a legitimate state interest to be upheld as constitutional." Affronti v. Crosson, 95 NY2d 713, 718 (2001), cert. denied, 534 U.S. 826 (2001) (citing Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)). Race, alienage, national origin, gender and illegitimacy are suspect or quasi-suspect classifications. Judges are not a suspect class. See Affronti, 95 NY2d at 719 ("[T]he disparate judicial salary

schedules in Judiciary Law §§ 221-d and 221-e do not involve suspect classes.”). Nor is there any basis for creating a new suspect class to include judges. They have none of the “traditional indicia of suspectness” identified by the Supreme Court: they are not “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

Moreover, no fundamental right is at issue here. See Affronti, 95 NY2d at 719. Fundamental rights are those “which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” Washington v. Glucksberg, 521 U.S. at 720-21 (internal citations omitted); see also People v. Isaacson, 44 NY2d 511, 520 (1978) (fundamental rights are “personal immunities so rooted in the traditions and conscience of our people as to be ranked as fundamental” [citation omitted]). Public officials do not have a fundamental right to have their salary adjusted to keep pace with inflation.

Thus, the rational basis standard of review would apply to petitioners’ equal protection claim. The rational basis standard of review is “a paradigm of judicial restraint.” Affronti v. Crosson, 95 NY2d 713, 716 (2001). Under such review, a classification will be upheld unless the resulting disparate treatment is “so unrelated to the achievement of any combination of legitimate purposes that . . . [it is] irrational.” Kimel v. Florida Bd. of Regents, 528 U.S. 62, 84 (2000) (internal quotation omitted). Furthermore, “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . .

whether or not the basis has a foundation in the record.” Heller v. Doe, 509 U.S. 312, 320-21 (1993) (internal quotation omitted); see also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (challenger must persuade the court that “the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker” [internal quotation omitted]). Indeed, “the State has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” Affronti, 95 NY2d at 719 (internal quotation omitted). Courts may hypothesize the Legislature’s motivation or possible legitimate purpose. See Dalton v. Pataki, 5 NY3d 243, 266 (2005) (quoting Port Jefferson Health Care Facility v. Wing, 94 NY2d 284, 290-911 (1999), cert. denied, 530 U.S. 1276 (2000)).

Petitioners do not negate every conceivable rational basis for the Legislature’s failure to grant them pay raises. The Legislature could rationally conclude, based on the high caliber of the judges who are currently sitting on the bench in this State, that current salary levels are adequate to attract talented and competent lawyers to the bench. The Legislature could also conclude in light of all the other demands placed upon the State’s resources that, however provident a raise for the judiciary might be, in light of the long-term commitment imposed under the State Constitution for such raises (as much as 14 years for Justices of the New York State Supreme Court like petitioners, for example), raises are not provident now. Any of these is a sufficient rational basis for the Legislature’s unwillingness to raise judicial salaries to date. Having failed to dispel every reasonable hypothesis, petitioners have failed to set

forth facts to establish their Equal Protection claim.

POINT V

Petitioners Fail to State a Basis for the Court to Intrude into Legislative Powers.

A) Petitioners Establish No Basis to Intrude into Legislative Policy-Making.

In their Third Cause of Action, petitioners assert that: (1) the State policy branches should be prohibited from considering judicial salary increases in conjunction with salaries of other state officials, other initiatives, or as a response to judicial decisions; (2) the “delegation of the authority of the Legislature to establish judicial salaries is unconstitutional, as applied”; and (3) they are entitled to a “system of judicial compensation which avoids linkage or other considerations . . .” Am. Pet. p. 7. As discussed above, petitioners have failed to allege specific facts that demonstrate they have been denied any entitlement under the statutes or constitutional provisions cited in the Amended Petition. Since there are no allegations demonstrating actionable wrongdoing, they fail to present a bona fide justiciable controversy. See, e.g., Niagara Mohawk Power Corp. v. State, 300 AD2d 949, 954 (Third Dept. 2002). As the petitioners do not present a justiciable grievance, the catalogue of reasons that might lead the Legislature to refuse to increase judicial salaries presents no justiciable issue.

There is no prohibition in the New York State Constitution barring the Legislature and the Executive from considering the impact of prospective increases in judicial pay on other programs, including the salaries due other State officials and employees. Indeed, as judicial terms exceed and in some cases vastly exceed the terms of legislators, the Executive and other State officials, judicial salaries necessarily impact budgets for more than a decade into the

future. Therefore, when considering whether to undertake the burdens of increased judicial salaries, it is entirely rational for the Legislature and the Governor to consider the long-term impact on the State's economy, other employees, and other priorities like providing for the People's general welfare and education.⁵

The New York Constitution, article VI, section 25(a), confers on the Legislature the authority to establish judicial salaries. Should petitioners want the State Constitution to restrict that authority or assign it elsewhere, they must seek an amendment of the State Constitution.

B) The Legislators, Legislature, and Governor Are Not Proper Parties Pursuant to the Speech and Debate Clause.

Because the State Constitution's Speech and Debate Clause prevents petitioners from haling respondent legislators and the Governor into court for their legislative actions, the Amended Petition, on its face, must be dismissed as against them. Even if plaintiffs were correct in their claim that they have been denied some right under the New York State Constitution article VI, section 25(a), which they are not, respondent legislators and Governor are not answerable in court.

The New York State Constitution article III, §11 provides: "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." "The fundamental purpose of the clause is to insure that the legislative function may be

⁵ For example, affording a newly elected Supreme Court Justice a 25% raise would cost the State just under one-half million dollars in salary alone should he or she complete a 14-year term.

performed independently.” Matter of Straniere v. Silver, 218 AD2d 80, 83 (Third Dept), aff’d, 89 NY2d 825 (1996). “The clause not only shields legislators from the consequences of litigation, but also protects them from the burden of defending themselves in court.” Id. (citing cases).⁶ In Matter of Straniere, the petitioners asserted that, inter alia, the failure of the Speaker to permit certain legislation to be considered for adoption without a home rule message was unconstitutional. Petitioners further averred that legislators and their staff erred in their statutory analysis. The Appellate Division, Third Department, held that the Speech and Debate Clause prohibited parties from haling legislators to court to answer for such purely legislative activities, like the allegedly unconstitutional refusal to consider proposed legislation, its passage or rejection. The Court noted that once it determined that the subject matter of the suit is legislative activity, then the privilege from immunity to suit applies and respondents’ motion to dismiss the petition must be granted. Id. The Court cautioned that the process to determine application of the immunity is not circular - that is - the privilege does not fall simply because it is asserted that the legislative activity in issue is alleged to be unconstitutional. The Court noted:

The privilege would be virtually worthless if courts determining its applicability had to carefully examine the acts ostensibly shielded (see, Tribe, American Constitutional law §5-18, at 372 [2d ed]). Because “judgments of legality or constitutionality obviously involve ‘questioning’ of legislative acts, courts may not strip acts taken in the legislative process of their constitutional immunity by finding that the acts are substantively illegal or unconstitutional” Matter of Straniere, 218 AD2d at 84.

Here, petitioners assert that Respondents Silver, Bruno, Assembly and Senate are

⁶ See also, Campaign for Fiscal Equity, Inc. v. State (271 AD2d 379 [1st Dept. 2000](subsequent citations omitted), granting a motion to preclude any evidence concerning any legislator’s motivation.

required as a matter of constitutional command to adopt new salaries for judges and justices of the Unified Court System. The petitioners urge that respondents are constitutionally prohibited from refusing to pass such legislation, attributing to the legislators a variety of invidious motivations. Petitioners further urge that the respondents are prohibited from tying raises for the judiciary to the adoption of any other legislation or any other consideration. The State Constitution, however, prohibits this Court and petitioners from interrogating legislators and their staffs as to their motivations for considering or not considering any legislation. As a matter of law, the New York State Constitution prohibits any citizen and the Court itself from compelling legislators to answer for their legislative deliberations and considerations. Matter of Straniere, 218 AD2d at 85.

New York State's Speech and Debate Clause has been construed to ensure that the other branches of government do not interfere with legislators in the performance of their duties. People v. Ohrenstein, 77 NY2d 38, 54 (1990). Article VI, §25(a), of the State Constitution, insofar as it commands that the compensation for the Judiciary shall be "established by law," clearly declares that this is an area of legitimate legislative activity. The State Constitution therefore places an impenetrable boundary between the branches of government, here prohibiting the Judiciary from interrogating the legislators, and thus interfering with the Legislature, even in a case which asserts that the Legislature has unduly interfered with the Judiciary, by refusing to grant certain raises.

The State's Speech and Debate Clause provides "at least as much protection as the immunity granted by the comparable provision of the Federal Constitution." People v. Ohrenstein, 77 NY2d at 53. As such, federal cases interpreting the latter position are

instructive, if not controlling. “It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.” U. S. v. Brewster, 408 U.S. 501, 525 (1972); see also Fields v. Office of Eddie Bernice Johnson, 459 F.3d 1, 14 (D.C. Cir. 2006) (internal citations and quotations omitted) (Speech and Debate Clause may prevent a plaintiff claiming discrimination by Congressional staff from establishing the real motivation for termination). “A Member ‘may not be made to answer’ questions - in a deposition, on the witness stand, and so forth - regarding legislative activities.” Id. (citing Gravel v. United States, 408 U.S. 606, 616 (1972)).

Finally, as to legislators, it is sufficient to note that the privilege applies when the nature of the underlying act in issue is legislative, regardless of the motive or intent of the official performing it. Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998). This absolute immunity simply prevents the finder of fact from speculating about the motives of the Legislature as it is not consonant with our form of government for the Court to even inquire as to the motives of the Legislature. See id., 54-55.

Similarly, when the Governor acts in his legislative capacity, whether signing or refusing to sign bills, or otherwise refusing to advance legislation, deliberating, or performing other functions integral to the legislative process, the Governor and Executive Staff are entitled to the same immunities as legislators. See Campaign For Fiscal Equity, Inc. v. State, 265 AD2d 277, 278 (1st Dept. 1999, subsequent citations omitted, citing Bogan v Scott-Harris, supra). While petitioners fail to allege facts demonstrating any wrongful conduct on the part of the Governor, because the underlying dispute deals with his role in adopting budgetary

legislation, he is entitled to immunity in any event.

The Governor, the Legislature, and State legislators are not the proper respondents and their motivations are beyond judicial purview.

CONCLUSION

Therefore, the Amended Petition Must Be Dismissed in its Entirety.

Dated: Albany, New York
July 12, 2007

ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for Respondents Silver, Assembly,
Bruno, Senate, Spitzer and DiNapoli
The Capitol, Albany, NY 12224



JAMES B. MCGOWAN
Assistant Attorney General of Counsel
Telephone: (518) 474-7642

Appendix A

**Legislative Debate Upon Chapter 51, Senate
Budget Bill No. 493, Assembly on Bill No.
9551-B**

DEBATES INFO

Date	Res Chap	Cal#	Senate#	Assembly#	Page#
3/13/2006	C51	493	6451	9551	1314-1321

Memo

Budget Bills
TITLE....Legislative & Judiciary
8PGS. \$2.00

THE SECRETARY: Calendar Number

20 493, Senate Budget Bill, Senate Print 6451, an

21 act making appropriations for the support of

22 government: Legislature and Judiciary Budget.

23 SENATOR SCHNEIDERMAN:

24 Explanation.

25 THE PRESIDENT: Senator Johnson,

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1 an explanation has been requested.

2 SENATOR JOHNSON: This is a bill

3 for the support of government dealing with the

4 Legislature and Judiciary Budget.

5 THE PRESIDENT: Senator

6 Schneiderman.

7 SENATOR SCHNEIDERMAN: Yes, if

8 the sponsor would yield for a brief question.

9 THE PRESIDENT: Senator Johnson,

10 do you yield for a question?

11 SENATOR JOHNSON: Yes, Madam

12 President.

13 THE PRESIDENT: You may proceed,

14 Senator Schneiderman.

15 SENATOR SCHNEIDERMAN: In this

16 budget that covers the judiciary, the

17 judiciary has not received any pay increase

18 since 1999. Does this legislation include any
19 provision for a pay increase for the
20 judiciary?

21 SENATOR JOHNSON: Well, there's
22 no legislation enacting a pay increase, but
23 there is money in this budget available,
24 \$69.5 million, subject to a chapter which we
25 have yet to enact.

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1 SENATOR SCHNEIDERMAN: Through
2 you, Madam President. So the money is there,
3 but there is no provision that it should be
4 used for a pay increase?

5 SENATOR JOHNSON: Did you ask me
6 a question?

7 THE PRESIDENT: Senator Johnson,
8 did you yield for that question?

9 SENATOR JOHNSON: Yes.
10 Yes, you are correct.

11 SENATOR SCHNEIDERMAN: Thank you.
12 Thank the sponsor.

13 I will be voting against this
14 because I find that, you know, the politics
15 here are superseding public policy. And I
16 would urge that it is time to revisit the

17 issues of the salaries last raised in 1999. I
18 think it's shameful that we aren't dealing
19 with that.

20 Given the absence of specific
21 provisions on that front, I will be voting
22 against this bill.

23 Thank you, Madam President.

24 THE PRESIDENT: Does any other
25 member wish to be heard?

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1 Then the debate is closed.

2 Senator DeFrancisco, first.

3 SENATOR DeFRANCISCO: Just to
4 make a point.

5 I think as an advocate for the
6 judicial pay increases, I think it's extremely
7 important that the money has been set aside
8 for that to happen if there's an agreement
9 between the houses and the Governor's office
10 as to how it would be structured and any other
11 parts of the bill -- because the other parts
12 of the proposal dealt with a commission being
13 appointed to study other potential reviews of
14 other elected officials and appointed
15 officials and the like.

16 So I think the fact that the money
17 is in here is, I think, a good first step.
18 And hopefully during the conference committees
19 and the process that goes on from this point
20 forward, we can resolve this issue to the
21 satisfaction of everyone.

22 THE PRESIDENT: The debate is
23 closed.

24 The Secretary will ring the bell.

25 Read the last section.

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1 THE SECRETARY: Section 5. This
2 act shall take effect immediately.

3 THE PRESIDENT: Call the roll.

4 (The Secretary called the roll.)

5 THE PRESIDENT: Senator Connor,
6 to explain your vote.

7 SENATOR CONNOR: Thank you, Madam
8 President.

9 I'm voting yes because I agree with
10 Senator Schneiderman that it's absolutely
11 atrocious that we haven't done a judicial pay
12 raise in all this time. But I'm an optimist,
13 and I'll take things step-by-step. And since
14 the money is in this bill for the judicial pay

15 raise, I want to vote for this bill because I
16 want to make sure that money is in there.

17 So hopefully, in my optimistic
18 foresight, we will get around to doing an
19 authorization as well setting judicial
20 salaries higher.

21 Thank you, Madam President.

22 THE PRESIDENT: You will be
23 recorded as voting in the affirmative,
24 Senator.

25 Senator Malcolm Smith.

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1 SENATOR MALCOLM SMITH: Thank
2 you, Madam President.

3 I will be voting no for this
4 particular bill only because, like my
5 colleague Senator Schneiderman, clearly having
6 the money set aside for the judicial pay
7 raises is only a possibility. And we know
8 from history, we've had money set aside for a
9 particular cause and it has gone there for
10 several years, reappropriated year after year.

11 And I just think if we have
12 language in the bill that makes it clear as to
13 the judges who deserve this raise -- it's an

14 embarrassment that you have first-year law
15 associates making more money than our judges.
16 I think we should do them the justice by, even
17 this particular first bill, making sure the
18 raise is very clear in addition to the
19 establishment of the commission.

20 So I'll be voting no.

21 THE PRESIDENT: You will be
22 recorded as voting in the negative, Senator.

23 Senator Krueger.

24 SENATOR LIZ KRUEGER: Thank you.

25 To explain my vote, Madam President.

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1 I've also voted no on this bill,
2 but I think it's important to raise one more
3 issue that no one else did, the fact that this
4 state underfunds legal-service representation
5 for indigent New Yorkers.

6 And year after year we hear people
7 come to us to talk about the fact that poor
8 people, usually in civil court proceedings,
9 cannot get attorneys, they end up having to
10 represent themselves pro se. It is not an
11 even playing field in our courts.

12 And I agree with my colleagues when

13 they talk about the importance of ensuring
14 that our judges continue on our bench because
15 they are getting fair pay for the work they
16 do, but I also think it's important for
17 someone in this house to rise and say we have
18 been underfunding legal representation for the
19 poor, both particularly in civil matters,
20 where there isn't the mandate that there is in
21 criminal matters.

22 And I hope when we move forward to
23 two-house bills sometime in the next few weeks
24 that we will take under consideration the
25 desperate need for legal representation of the

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1 poor.

2 Thank you, Madam President.

3 THE PRESIDENT: You will be
4 recorded in the negative on the bill.

5 The Secretary will announce the
6 results.

7 THE SECRETARY: Those recorded in
8 the negative on Calendar Number 493 are
9 Senators Coppola, Diaz, Dilan, Duane,
10 Gonzalez, L. Krueger, Montgomery, Parker,
11 Paterson, Sabini, Savino, Schneiderman,

12 A. Smith, M. Smith, and Stavisky. Also

13 Senator Andrews.

14 Ayes, 43. Nays, 16.

15 THE PRESIDENT: The bill is

16 passed.

PATRICK

NYS ASSEMBLY

MARCH 31, 2006

Street parking garage building located in the City of Albany; to amend the Public Authorities Law, in relation to the issuance of bonds; to amend the State Finance Law, in relation to the issuance of certificates of participation, variable rate bonds, payments, transfers and deposits of funds and investment of General Funds, bond proceeds, and other funds not immediately required; to amend the Public Authorities Law, in relation to State Environmental Infrastructure Projects and providing for the repeal of certain provisions upon expiration thereof.

ACTING SPEAKER GREENE: On a motion by Mr. Farrell, the Senate bill is before the House. The Senate bill is advanced. Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER GREENE: The Clerk will record the vote.

(The Clerk recorded the vote.)

The Clerk will announce the results.

(The Clerk announced the results.)

The bill is passed.

On the main Calendar, Rules Report No. 542, the Clerk will read.

THE CLERK: Page 34, Bill No. 9551-B, Rules Report No. 542, Budget Bill. An act making appropriations for the support of government. (Legislature and Judiciary Budget)

ACTING SPEAKER GREENE: On a motion by Mr. Farrell, the Senate bill is before the House. The Senate bill is

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advanced.

Mr. Hayes.

MR. HAYES: Thank you, Madam Speaker. Will Mr. Farrell yield for a question?

ACTING SPEAKER GREENE: Will you yield, Mr. Farrell?

MR. FARRELL: Yes, Madam Speaker.

MR. HAYES: One question, Mr. Farrell. I note that this budget contains an appropriation, the acceptance of an appropriation of \$69.5 million in anticipation of legislative action on judicial salary reform; is that correct?

MR. FARRELL: Yes.

MR. HAYES: So that means that a portion of that money, somewhere in the neighborhood of \$32 million, would be used to grant retroactive pay raises to the State's Judiciary retroactive to April 1, 2005; is that correct?

MR. FARRELL: If we do a chapter to say such, yes.

MR. HAYES: But the money is there, we just haven't done the authorization?

MR. FARRELL: The money is there.

MR. HAYES: Thank you very much.

ACTING SPEAKER GREENE: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER GREENE: The Clerk will

NYS ASSEMBLY

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record the vote.

(The Clerk recorded the vote.)

The Clerk will announce the results.

(The Clerk announced the results.)

The bill is passed.

On the A-Calender, page 12, Rules Report No. 562,
the Clerk will read.

THE CLERK: Bill No. 10127, Rules Report No.
562, Mr. Weisenberg. An act to amend the Real Property Tax Law, in
relation to the adjusted base proportions in the County of Nassau.

ACTING SPEAKER GREENE: On a motion by Mr.
Weisenberg, the Senate bill is before the House. The Senate bill is
advanced. Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER GREENE: The Clerk will
record the vote.

(The Clerk recorded the vote.)

The Clerk will announce the results.

(The Clerk announced the results.)

The bill is passed.

Mr. Tokasz.

MR. TOKASZ: Madam Speaker, before we close,
and we have completed the budget process, I think Leader Tedisco
and the Chair of the Ways and Means Committee would like to make
some appropriate comments.