No. 09-1395

IN THE

Supreme Court of the United States

PETER H. BEER, U.W. CLEMON, TERRY J. HATTER, JR., THOMAS F. HOGAN, RICHARD A. PAEZ, LAURENCE H. SILBERMAN, AND A. WALLACE TASHIMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE FEDERAL JUDGES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KEVIN M. FORDE
RICHARD J. PRENDERGAST
Suite 1100
111 W. Washington St.
Chicago, Illinois 60602
(312) 641-1441

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MARTIN V. TOTARO
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Amicus Curiae Federal Judges Association

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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QUESTION PRESENTED

Whether the Compensation Clause of Article III prevents Congress from withholding the future judicial salary adjustments established by the Ethics Reform Act of 1989.

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INTEREST OF *AMICUS CURIAE*

The Federal Judges Association ("FJA") is a voluntary association of Article III judges devoted to protecting the independence of the judicial branch.[1] With more

[1] Pursuant to this Court's Rule 37.2(a), *amicus curiae* certifies that counsel of record for all parties received timely notice of *amicus*'s intent to file this brief, and that all parties consented to the filing of the brief. Copies of the letters granting consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* certifies that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person

than 900 federal judges in its membership nationwide, the FJA seeks to express the views of Article III judges to other branches of government and the public whenever judicial independence is threatened. From time to time, courts must make unpopular decisions that evoke adverse reactions from the public, the legislature, and the executive branch. The FJA enables those serving in the judicial branch to defend the judiciary's independence—independence that ultimately protects freedom for all—with a single voice, underscoring the importance of an independent judiciary to a free society even in the face of unpopular decisions. To promote judicial independence, the FJA seeks adequate compensation and support for the performance of judicial functions, so that the judicial branch will continue to attract capable, diverse, and experienced individuals whose service can continue for the life tenure the Constitution contemplates.

The question presented in this case is whether Congress, having made future cost-of-living adjustments to judicial salaries part of judicial compensation in the Ethics Reform Act of 1989, may nonetheless withhold those adjustments. *Amicus* and its members have a vital interest and unique insights into that question. The Constitution's prohibition on diminution of judicial compensation and its guarantee of life tenure are designed to ensure judicial independence—to protect judges from intimidation, undue influence, or domination—so that judges can adjudicate every case fairly and independently as the law and facts require. They also promote sound judicial administration, helping to ensure that the judiciary attracts and retains the most capable and experienced individuals.

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other than *amicus*, its members, and its counsel made such a monetary contribution.

The Federal Circuit's resolution of the question presented is at war with those purposes. The decision does not merely allow Congress to rescind the compensation Congress itself established by law, causing judicial compensation to decline in real terms. It also has devastating consequences for the judicial branch. Judicial administration suffers when inadequate compensation—caused in significant part by Congress's repeated failure to grant promised cost-of-living adjustments—forces many of the most experienced members of the judiciary to leave the bench for better paying positions. Public confidence in the judiciary suffers when the expectation of lifetime service gives way to the notion that judges serve for only so long as financial circumstances permit. And independence from the political branches becomes a mere phantom when judges are forced to return to Congress, year after year, to plead for the compensation that Congress by law had already granted them.

REASONS FOR GRANTING THE PETITION

This case concerns the important structural guarantees designed to protect the independence and efficacy of the federal judiciary. Article III of the Constitution provides that judges "shall hold their Offices during good Behaviour" and "shall * * * receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. Aggrieved by a colonial judiciary dependent on the goodwill of the sovereign, the Framers understood from experience the necessity of an independent and effective judicial branch. The drafters of the Declaration of Independence thus complained that the King had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Declaration of Independence ¶ 11 (1776). "Of all

the grievances detailed in the Declaration of Independence, none was more galling than the lack of independence imposed by King George on Colonial Judges." American College of Trial Lawyers, *Judicial Compensation* 2 (2007); see also Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. Rev. 308, 311-312 (1976); *United States* v. *Will*, 449 U.S. 200, 217-221 (1980) (outlining history and purposes of the Compensation Clause). By prohibiting diminution of compensation, the Constitution leaves Congress free to vest the judiciary with additional compensation. But it precludes Congress from thereafter rescinding the decision to do so.

This case involves Congress's effort to do precisely that. The Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (the "1989 Act"), guaranteed federal judges automatic annual cost-of-living increases to compensate for inflation according to a non-discretionary formula. Congress provided only one narrow exception: The President can withhold those adjustments only if, based on a "national emergency" or "serious economic conditions affecting the public welfare," he chooses also to withhold cost-of-living allowances from other federal employees. See Pet. 7-8. The 1989 Act's cost-of-living adjustments were granted as part of a trade-off for accompanying limits on judges' receipt of honoraria. See *id.* at 7.

Since 1989, however, Congress has repeatedly prevented the Act's automatic cost-of-living adjustments from taking effect (in 1995, 1996, 1997, 1999, 2007, and 2010) even while granting such adjustments to federal employees. See Pet. 8-9, 13. Congress is now poised to deny judges those adjustments once again in 2011. As a result, judicial compensation in real terms—the actual

purchasing power of the salaries judges receive—has declined precipitously. And it has fallen even more precipitously in relation to compensation in the private sector, academia, and the executive branch. See pp. 8-9, *infra*.

The Federal Circuit's decision upholding Congress's actions has profound consequences. Sound judicial administration inevitably suffers when inadequate compensation—caused in significant part by Congress's repeated failure to grant promised cost-of-living adjustments—forces many of the most esteemed and experienced members of the judiciary to leave the bench for more remunerative endeavors. The public's respect for the judicial branch and its independence suffers as well. Core constitutional values are undermined when "judges effectively serve for a term dictated by their financial position rather than for life." Chief Justice John G. Roberts, Jr., *2005 Year-End Report on the Federal Judiciary* 3-4 (2006) (*"Chief Justice's 2005 Year-End Report"*). As Members of this Court have observed, the resulting crisis "threatens to undermine the strength and independence of the federal judiciary."[2] The consequences are so im-

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[2] Chief Justice John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary* 1 (2007) (hereinafter *"Chief Justice's 2006 Year-End Report"*); see also *Testimony of Associate Justice Samuel Alito Before the H. Comm. on the Judiciary, Subcomm. on the Courts, the Internet and Intellectual Property* (Apr. 19, 2007) (hereinafter *"Alito Testimony"*), *available at* http://www.federaljudgesassoc.org/egov/docs/1180801044_908691.pdf; *Testimony of Associate Justice Anthony M. Kennedy Before the S. Comm. on the Judiciary, Judicial Security and Independence* (Feb. 14, 2007) (hereinafter *"Kennedy Testimony"*), *available at* http://www.federaljudgesassoc.org/egov/docs/1178654934_39215.pdf; *Testimony of Associate Justice Stephen Breyer Before the H. Comm. on the Judiciary, Subcomm. on the Courts, the Internet and Intellectual Property* (Apr. 19, 2007) (hereinafter *"Breyer Testimony"*), *available at* http://www.federaljudgesassoc.org/egov/docs/1178647977_284179.pdf.

portant, so pervasive, and so long-lasting that they should be tolerated—if at all—only following an authoritative decision of this Court, not a fragmented ruling of a subordinate federal tribunal. See Pet. App. 8a-9a (Michel, C.J., joined by Lourie & Moore, JJ., dissenting from denial of rehearing en banc); *id.* at 10a-16a (Newman, J., dissenting from denial of rehearing en banc).

Nearly a decade ago, when this issue came before the Court in *Williams* v. *United States*, No. 01-175, cert. denied, 535 U.S. 911 (2002), there may have been reason to believe that Congress "over time" would "deal with the decline in judicial compensation, making good on the 1989 Act's inflation-adjustment promise." 535 U.S. at 919 (Breyer, J., joined by Scalia & Kennedy, JJ., dissenting from denial of certiorari). Deferring review in the hope of a congressional solution had the potential to avoid the necessity of this Court ruling on matters affecting its own Members' compensation. Since *Williams*, however, Congress's opportunity to make good on the 1989 Act's promise has repeatedly come and gone. It is now clear that Congress will not meet its promise, much less remedy the effects of its past failures. And the impact on the judicial branch is rapidly becoming irreparable. Whatever short-term discomfort further review of this case may entail is vastly overshadowed by the Nation's long-term interest in an independent and effective judiciary. Accordingly, the petition should be granted.

I. THE PETITION PRESENTS A PRESSING ISSUE OF GREAT IMPORTANCE

The importance of the question presented is difficult to overstate. Congress's repeated failure to provide the compensation it established in the Ethics Reform Act of 1989 has had far-reaching, ongoing, and potentially irreversible consequences. Those failures do not merely

damage the long-term efficacy of our system of justice. They also undermine a constitutional bulwark critical to preserving judicial independence and our system of separated powers.

A. The Decision Below Is Having An Enormous Impact On The Administration Of Justice In The Federal Courts

The simple fact is that the federal judiciary is losing some of its best, brightest, and most experienced members. Four years ago, the Chief Justice observed that, in "the face of decades of congressional inaction, many judges who must attend to their families and futures have no realistic choice except to retire from judicial service and return to private practice." *Chief Justice's 2006 Year-End Report*, *supra*, at 6. Four months later, Justice Alito made the same point: "[T]he federal judiciary is losing some of its best and brightest judges." *Alito Testimony*, *supra*, at 15. "[A] substantial proportion of these separations were related to compensation," he explained, and "the numbers are on the rise." *Id.* at 22. For that reason alone, the question presented is "an important one." *Williams*, 535 U.S. at 921-922 (Breyer, J., joined by Scalia & Kennedy, JJ., dissenting from denial of certiorari).

Since 2006, Congress has continued its pattern of refusing the cost-of-living increases promised by the 1989 Act. According to the Administrative Office of the U.S. Courts, judges have already lost hundreds of thousands of dollars in pay as a result:

> The[se] repeated denials of the [cost-of-living adjustments] in 1994, 1995, 1996, 1997, 1999, 2007, and 2010 have created major and growing financial losses for judges: a district court judge on the bench since 1993 failed to receive a total of $283,100

> in statutorily authorized but denied pay. Appellate court judges have lost even more.

Administrative Office of the U.S. Courts, *Federal Judicial Pay Increase Fact Sheet*, *at* http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/JudicialPayIncreaseFact.aspx. Over a lifetime of service, the compounded losses can amount to more than $1 million.[3] The denials, moreover, have caused judicial salaries to *drop* in inflation-adjusted terms.[4] At the same time, the difference between judicial salaries and those elsewhere has grown dramatically—whether one considers private practice,[5] academia,[6] or even the executive

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[3] For example, if Congress repeated the denials at the current rate during 35 years of lifetime service beginning on January 1, 1995, the total lost compensation for a district court judge would be approximately $1.2 million (based on an average 2.4% cost-of-living adjustment). See App. A, *infra*, at 2a.

[4] See, *e.g.*, *Chief Justice's 2006 Year-End Report*, *supra*, at 6; *Breyer Testimony*, *supra*, at 3-5 & app. 1 ("Charts Demonstrating the Decline in Judicial Compensation"); *Kennedy Testimony*, *supra*, at 8 ("Between 1969 and 2006, the real pay of district judges declined by about 25 percent."); *Alito Testimony*, *supra*, at 4-5.

[5] "Twenty years ago, a federal judge's salary was about 1/3 what that judge would have made as a partner at a large firm; today it is about 1/7 as much." *Breyer Testimony*, *supra*, at 4; see also *Alito Testimony*, *supra*, at 15; Letter from John C. Danforth & Leon E. Panetta to Senators Patrick J. Leahy and Arlen Specter (May 7, 2007), *available at* http://www.federaljudgesassoc.org/egov/docs/1180802518_402740.pdf. In many areas, "[t]he salaries of newly minted associates are approaching the salaries of federal judges." Frank B. Cross, *Perhaps We Should Pay Federal Circuit Judges More*, 88 B.U. L. Rev. 815, 825 (2008).

[6] "[A] federal district judge receives * * * approximately half of what the top professors are paid." *Breyer Testimony*, *supra*, at 4. Those professors' salaries have outpaced cost-of-living adjustments; by contrast, judges' real compensation has declined. *Id.* at 3-4.

branch.[7] Thus, as Justice Alito has observed, "it would be reasonable to conclude that a district judge who presides over an SEC case may be the lowest paid attorney in the courtroom," *Alito Testimony*, *supra*, at 9—and probably the only one who will not receive an annual cost-of-living increase, see, *e.g.*, SEC, *In Brief: FY 2011 Congressional Justification* 11 (2010).

As a result, talented and experienced jurists continue to leave the bench. Judge Michael McConnell (10th Cir.) resigned to return to academia; Judge Stephen Larson (C.D. Cal.) resigned to return to private practice; Judge Paul Cassell (D. Utah) resigned to return to academia; and Judge U.W. Clemon (N.D. Ala.)—a party in this case—recently resigned to return to private practice. Chief Judge Robert Henry (10th Cir.) has announced he will resign to become head of Oklahoma City University; and Judge Stanley Birch (11th Cir.) has indicated he will resign in August 2010 to join a private mediation and arbitration firm. The state of judicial pay looms large in many such departures.[8] And the list goes on. See *Ken-*

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[7] The FDIC, the SEC, "and quite a few other agencies offer salaries to lawyers * * * of $200,000 or more." *Breyer Testimony*, *supra*, at 4.

[8] Notwithstanding the delicacy of the issue, departing judges have often made their reasons for resigning public. Judge Cassell candidly noted the impact of "uncertainty surrounding judicial pay": "With three talented children approaching college years," he explained, "it has been difficult * * * to make financial plans." Letter from Judge Paul G. Cassell to President George W. Bush (Sept. 21, 2007), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/cassell_presidentresign920fix.rtf. Judge Clemon cited "the greatly diminished salary status of federal judges" as "[o]ne of the powerful factors which led" to his decision. Letter from Judge U.W. Clemon to President Barack Hussein Obama (Jan. 30, 2009), *available at* http://www.federaljudgesassoc.org/egov/docs/1233780173_3265.pdf. Judge Larson noted that his salary had "remain[ed] stagnant" and was "actually declining" in "terms of pur-

nedy Testimony, *supra*, at 9 ("In just the past year, two of the finest federal district judges in California have left for higher-paying jobs elsewhere * * * ."); *Breyer Testimony*, *supra*, at 5-6 (similar); Letter from Judge J. Michael Luttig, U.S. Court of Appeals for the Fourth Circuit, to President George Bush (May 10, 2006), *available at* http://www.ca4.uscourts.gov/pdf/ltpres.pdf (citing soon-to-be college-age children).

Certain districts have been hit particularly hard. In the District of New Jersey, seven judges have "retired" to private practice in the last decade. The Central District of California has suffered even greater losses: "Between 1998 and August 2009, eight federal district judges from the Central District resigned or retired from the federal court system." *The Need for Legislation to Address Judicial Compensation: Statement of Chief Judge Audrey B. Collins on the Resignation of Judge Stephen G. Larson*, 60 Riverside Law. 10, 10 (2010). Five of those eight did so to join "the largest private alternative dispute resolution provider in the world," and "[t]wo resigned to accept state judicial appointments, at a higher salary and better health benefits." *Ibid.* The Tenth Circuit will have lost almost 17 percent of its active judges within a span of 12 months.

Even a single departure has serious consequences. "Every time an experienced judge leaves the bench early,

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chasing power"; he explained that he had to "place [his] family's interest, particularly the future of [his] children, ahead of [his] own fervent desire to remain a federal judge." *U.S. Federal Judge Quits; Cites Flat Pay, 7 Children*, Reuters, Sept. 17, 2009, *available at* http://www.reuters.com/article/idUSTRE58G4D020090917; see also ABA/FBA, *Federal Judicial Pay* 27-28 (2003) (collecting statements by "judges who have prematurely departed from the Federal bench" about "how their inadequate judicial salaries affected their decision to resign").

the judiciary suffers a real loss." *Chief Justice's 2005 Year-End Report*, *supra*, at 5. Resignations impose not merely "the cost of locating, screening, and vetting qualified applicants, [and] the cost of training the new judges," but also "the cost to the system as the remaining judges must shoulder the extra workload until a replacement is sworn in." American College of Trial Lawyers, *supra*, at 5. That lattermost cost is particularly severe given present-day caseloads and case complexity. "When an experienced Federal judge retires or resigns, the caseloads of the remaining judges on that court, by necessity, increase until the resulting vacancy is filled (a process that can take months, and sometimes years)." ABA/FBA, *Federal Judicial Pay* 21-22 (2003). Judicial efficiency suffers when the judges who remain on the bench must struggle with an increased caseload while coming up to speed on the complex matters they inherit from departing colleagues (all in exchange for compensation that keeps declining in real terms year after year). The impact of diminution in the ranks of senior judges—an especially cost-effective and critical part of the federal judiciary—can be particularly severe. See Bar Ass'n Br. 6.

More important, "[t]he institutional knowledge and experience" that departing judges take with them "is not easily replaceable." *Alito Testimony*, *supra*, at 19; see also ABA/FBA, *supra*, at 22. No matter how capable a new appointee, she "cannot be expected to be as efficient as an experienced judge." *Alito Testimony*, *supra*, at 23. As Chief Justice Rehnquist observed years ago: "Every time an experienced judge leaves the bench the nation suffers a temporary loss in judicial productivity. It takes time for a new judge to gain the experience necessary to judge well and manage an ever-increasing docket efficiently." *Public Hearings of the Nat'l Comm. on the*

Public Service: A Time of Crisis and Opportunity 3 (July 15, 2002) ("*Public Hearings*"), *available at* http://www.brookings.edu/comm/transcripts/20020715.pdf; see also ABA/FBA, *supra*, at 22 ("Rarely do new appointees join the bench with the range of judicial capabilities and experience that years of service confer."). Indeed, Chief Justice Burger was of the view that "[i]t takes five years for a qualified attorney to reach peak efficiency as a Federal judge." ABA/FBA, *supra*, at 22 n.67. The early departure of even "a single judge" thus "creates a gap in the system that cannot be closed for years." *Alito Testimony*, *supra*, at 23. Given the number of departures and their concentration in particular districts, pp. 9-10, *supra*, those "gaps" are rapidly becoming gaping holes.[9]

B. The Decision Below Undermines The Independence Of The Federal Judiciary

The consequences identified above would be cause for concern in any context. But "[i]n the case of the judiciary, intangible harms of this kind threaten the Framers'

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[9] The institutional costs of turnover are well-documented in social science literature. Members of any institution "increase their productivity by learning new skills and perfecting old ones while on the job." Gary S. Becker, *Human Capital: A Theoretical and Empirical Analysis With Special Reference to Education* 31 (3d ed. 1993). But "voluntary turnover eliminates the organization's return on investment." Gregory G. Dess & Jason D. Shaw, *Voluntary Turnover, Social Capital, and Organizational Performance*, 26 Acad. of Mgmt. Rev. 446, 447-448 (2001). Numerous studies have thus highlighted the institutional costs of turnover in a variety of contexts. See, *e.g.*, Georgia Budget & Policy Inst., *State Employment: The Cost of Turnover* 5-6 (2006); Gary Barnes *et al.*, *The Cost of Teacher Turnover in Five School Districts: A Pilot Study* 4-9 (2007). Uncertain and declining compensation increases the rate of resignations—and, correspondingly, the damage the institution may suffer. See Becker, *supra*, at 44.

constitutional objective, a strong, independent judicial institution." *Breyer Testimony*, *supra*, at 8.

1. "It is essential to the integrity of the Article III system that * * * those now beginning their judicial tenure do so with the expectation that it will be a lifelong commitment." *Kennedy Testimony*, *supra*, at 7-8. Once "departure is the remedy" to low pay, "the public at large may come to think of a judicial appointment, not as the 'capstone' of a legal career but as a way station." *Breyer Testimony*, *supra*, at 6. The notion that judges might treat "federal judicial service as a mere stepping-stone to re-entry into the private sector and law firm practice is inconsistent with our judicial tradition," *Kennedy Testimony*, *supra*, at 11—and with good reason.

The impression that a federal judgeship may represent a temporary stepping stone is a concern not just for the judge—although *amicus* expects the judge will decide cases without consideration for his or her own future—but also because of public perception. The mere appearance that "judges are using the federal bench as an opportunity to embellish their resumes for more lucrative opportunities later in their professional careers"—perhaps in private practice with the firms that appear before them—"could undermine faith in the impartiality of our judiciary." *Kennedy Testimony*, *supra*, at 11. Such a perception "is directly at war with judicial independence" because it undermines the public trust that the judiciary carries out its duties in a forthright and impartial manner. *Breyer Testimony*, *supra*, at 6.[10]

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[10] As Chief Justice Rehnquist warned Congress years ago, the "prospect that low salaries might force judges to return to the private sector rather than stay on the bench risks affecting judicial performance. Instead of serving for life, those judges would serve the terms their finances would allow and they would worry about what [a]waits

The notion of judicial office as a temporary waystation is also inconsistent with the expectations the Framers enshrined in constitutional text. The Constitution's guarantee of life tenure during good behavior anticipates that judges actually will serve *for life* during good behavior—that judicial service would be the capstone of a career and not a temporary stop until economic circumstances force the judge to seek a new position. Congress's decision to deny federal judges the cost-of-living adjustments it mandated in the 1989 Act, which has already cost the average judge several hundred thousand dollars, makes the Framers' expectations increasingly difficult to achieve.

2. Judicial independence from the political branches is also at stake. Despite the 1989 Act's statutory promise of automatic cost-of-living increases, Congress has repeatedly taken the position that judges—and judges only—should not receive such adjustments. That position is based on a provision, first found in a fiscal year 1982 appropriations resolution governing the use of 1982 funds, that purportedly requires a specific affirmative enactment each year before judges' cost-of-living increases can be paid. See Pub. L. No. 97-92, § 140, 95 Stat. 1200 (1981). In *Williams* v. *United States*, 240 F.3d 1019 (Fed. Cir. 2001), the government argued that the provision (Section 140) required a separate enactment to authorize any salary adjustment for judges, including the cost-of-living adjustments mandated by the 1989 Act. *Id.* at 1026. The Federal Circuit rejected that argument for two reasons: (1) Section 140 expired by its own terms in 1982; and (2) the 1989 Act was itself a statute that pro-

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them when they return to the private sector." *Public Hearings*, *supra*, at 2; see also *Chief Justice's 2005 Year-End Report*, *supra*, at 3-4 (similar).

vided the necessary authorization. *Id.* at 1026-1027. Congress's reenactment of Section 140 after the Federal Circuit's decision in *Williams*, Pub. L. No. 107-77, tit. VI, § 625, 115 Stat. 748, 803 (2001), may have obviated the Federal Circuit's first holding, but does not address the second: The 1989 Act still provides the authorization the provision purports to require.

In any event, there are more serious problems with the government's reliance on Section 140. The fact that Section 140 "refers specifically to federal judges" and "imposes a special legislative burden on their salaries alone" by itself "throw[s] the constitutionality of that provision into doubt." *Williams*, 535 U.S. at 918 (Breyer, J., joined by Scalia & Kennedy, JJ., dissenting from denial of certiorari). More fundamentally, Section 140 underscores the threat to judicial independence: Absent a ruling from this Court on the issue, its practical effect will be (and has been) to require federal judges to return to Congress, year after year, to plead for the cost-of-living allowances the 1989 Act mandates. The Compensation Clause was included in the Constitution for the precise purpose of preventing Congress from exercising "power over [judges'] subsistence," which "[i]n the general course of human nature" can amount to "a power over [their] will." *The Federalist No. 79*, p. 472 (Clinton Rossiter ed., 1961) (emphasis omitted). The prospect of federal judges returning to Congress, year after year, palm extended, to plead for the cost-of-living increases the 1989 Act previously granted them cannot be reconciled with that constitutional design.

The intrusion on judicial independence is exacerbated by Congress's practice of linking salary adjustments for judges to salary adjustments for political employees, such as Members of Congress themselves. That prac-

tice—which is of recent vintage, ABA/FBA, *supra*, at 5-6—makes the judicial compensation owed under the 1989 Act a hostage of the politics from which the judiciary is supposed to be insulated. See IMLA Br. 17-20.

3. "Judicial independence," moreover, "presumes judicial excellence, and judicial excellence is in danger of erosion." *Kennedy Testimony*, *supra*, at 6. Members of this Court have warned that, "if Congress permits the judges' real pay to erode without redress," we "cannot expect the federal judicial system to function independently and effectively, as the Constitution's Framers intended." *Breyer Testimony*, *supra*, at 11. "[S]ooner or later," "today's eroding federal judicial salaries will lead * * * to less capable judges and ultimately to inferior adjudication." *Alito Testimony*, *supra*, at 2.

Notwithstanding the enormous honor that federal judicial service represents, as a matter of cold economics the "judiciary competes in the marketplace with other federal, state, and local government employers as well as private and non-profit sector employers in the so-called 'war for talent.'" *Statement of Judge D. Brock Hornby & Chief Judge Philip M. Pro Before the H. Comm. on Government Reform, Subcomm. on the Federal Workforce and Agency Organization* 2 (Sept. 20, 2006), *available at* http://www.uscourts.gov/News/Viewer.aspx?doc=/uscourts/News/2006/docs/JudgesHornbyandProFederalWorkforce092006.pdf. The "persisting differentials" in compensation—to say nothing of the decline in real compensation—"create an atmosphere in which it is difficult to attract eminent attorneys to the bench and to convince experienced judges to remain." *Kennedy Testimony*, *supra*, at 10; see pp. 6-9 & nn. 3-8, *supra*.

"Every time a potential nominee refuses to be considered, the pool of candidates from which judges are se-

lected narrows." *Chief Justice's 2005 Year-End Report*, *supra*, at 5. Likewise, every time a judge resigns, she takes with her all of the training and knowledge she has accumulated. "[T]here can be systemic injury over time, caused by slow erosion from neglect." *Kennedy Testimony*, *supra*, at 7. "If this comes to pass, the function of our courts as the guardians of the rule of law will be undermined." *Alito Testimony*, *supra*, at 2.

4. Finally, the compensation gap—due in significant part to Congress's withholding of cost-of-living adjustments—is transforming the composition of the federal judiciary. Because of the deterioration in real compensation, the percentage of federal judges drawn from private practice has declined dramatically. "If one examines the federal district court judges at the time of President Eisenhower, one finds that only about 1/5 previously had been state court judges or magistrates." *Breyer Testimony*, *supra*, at 7. More recently, however, "the percentage of those whose career has followed a judicial 'professional' path has increased, from about 20% to more than 50% of district court judicial appointments." *Ibid.* At the same time, "the percentage coming from other sectors has correspondingly declined." *Ibid.*; see also *Chief Justice's 2006 Year-End Report*, *supra*, at 3-4; *Kennedy Testimony*, *supra*, at 14 ex. 2; Russell Wheeler, *Changing Backgrounds of U.S. District Judges*, 93 Judicature 140, 144-145 (2010).

"It changes the nature of the federal judiciary when judges are no longer drawn primarily from among the best lawyers in the practicing bar." *Chief Justice's 2006 Year-End Report*, *supra*, at 3-4. While much of continental Europe relies on a professionalized judiciary, "that is not our tradition." *Breyer Testimony*, *supra*, at 7. Members of this Court have questioned whether that

shift might undermine judicial independence in a way that affects outcomes. "Would a continental style, highly professionalized judiciary have written *Brown* v. *Board of Education*? Could it have survived that decision's aftermath?" *Ibid.* "[A] judiciary drawn more and more" from either the independently wealthy or "people for whom the judicial salary represents a pay increase" would "not be the sort of judiciary on which we have historically depended to protect the rule of law in this country." *Chief Justice's 2006 Year-End Report*, *supra*, at 7; see also *Kennedy Testimony*, *supra*, at 9; Danforth & Panetta, *supra*, at 1; ABA/FBA, *supra*, at 23.

This Nation has a strong, valuable tradition of drawing judges from a variety of sources—private practice, the offices of state and federal prosecutors, the state bench, the offices of public defenders, academia, and political life alike. The significant shift in that tradition being propelled by compensation issues further underscores the broad impact, and overwhelming importance, of this case.

II. IMMEDIATE REVIEW IS IMPERATIVE

The pressing issues raised by this case cannot and will not be resolved absent this Court's intervention. Congress has now refused to provide the federal judiciary with the 1989 Act's cost-of-living adjustments six times—twice since *Williams*—and yet another denial is on the horizon. Because of the ongoing effects of compounded losses (the opposite of compound interest), judges are losing more compensation with each passing year. And a cost-of-living increase in one year does not correct for its absence in a prior year. To the contrary, the amount of each later adjustment is *reduced* because of prior denials. As a result, "[t]he longer it takes to raise salaries, the more serious the problem becomes." *Statement of Chief Justice William H. Rehnquist on Receipt of ABA-FBA*

White Paper on Judicial Pay (May 28, 2003), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_05-28-03.html.

While there once may have been hope that Congress would correct the situation, see *Williams*, 535 U.S. at 919 (Breyer, J., joined by Scalia & Kennedy, JJ., dissenting from denial of certiorari), the likelihood of congressional correction has dimmed beyond perception. Far from fixing the problem in the wake of this Court's denial of certiorari in *Williams*, Congress has exacerbated the crisis, again refusing federal judges—but not other federal employees—cost-of-living increases in 2007 and 2010. Rather than make up for any past denials, moreover, Congress is poised to deny federal judges the cost-of-living increases yet again in 2011.[11]

As Members of Congress have explained, judicial salaries are simply "not on the radar screen." *Judicial Compensation Hearing*, *supra* (statement of Rep. Schiff). This "is not a popular cause," and there is no constituent pressure; "the public never raises this issue." *Ibid.*; see *Remarks of Sen. Jeff Sessions*, 2009 WL 3772799 (Nov. 12, 2009) ("Question: *** Is there any appetite in this administration for improvement of judicial pay *** ? Sessions: No, there's not any appetite for that."); 154

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[11] Because congressional and judicial cost-of-living adjustments are typically linked, when Congress refuses to provide itself with a cost-of-living increase, it is extremely unlikely to grant the judiciary an increase. See, *e.g.*, *Federal Judicial Compensation: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Courts, the Internet, and Intellectual Property*, 2007 WL 1191679 (2007) (statement of Rep. Berman) (hereinafter "*Judicial Compensation Hearing*") ("[F]rom 24 years experience, if we insist on linkage, we will end up saying no to any change in judicial salaries."). And Congress has already rejected a cost-of-living increase for itself for fiscal year 2011. See Pub. L. No. 111-165, § 1, 2 U.S.C. § 31 note (2010).

Cong. Rec. S10904 (daily ed. Dec. 11, 2008) (statement of Sen. McCaskill) ("[w]rong time, wrong place"; "it sends the wrong message to the United States of America"). And there is opposition on a variety of grounds. See *Judicial Compensation Hearing*, *supra* (statement of Rep. Sensenbrenner) (stating that judges should not receive additional compensation absent "proof" that the responsibilities of a district judge exceed the "responsibilities and time involved in being a member of [Congress]"); 149 Cong. Rec. H108 (daily ed. Jan. 8, 2003) (statement of Rep. Sensenbrenner) (similar).

Congress thus has not merely failed to "mak[e] good on the 1989 Act's inflation-adjustment promise" in the past. *Williams*, 535 U.S. at 919 (Breyer, J., joined by Scalia & Kennedy, JJ., dissenting from denial of certiorari). It continues to do so. And there is no indication Congress will provide a remedy for its many past failures.

Amicus is fully aware that a congressional solution would have been preferable, given the sensitivity of asking this Court to decide matters of judicial compensation. Notwithstanding the Rule of Necessity, there is a potential for "embarrassment" inherent in "deciding a matter that would directly affect [the Justices'] own pocketbooks," and a possible impact on the "public's high opinion of the Court." *Williams*, 535 U.S. at 919 (Breyer, J., joined by Scalia & Kennedy, JJ., dissenting from denial of certiorari); see also *Breyer Testimony*, *supra*, at 1. But this Court has decided Compensation Clause issues in the past with no perceptible impact on its institutional credibility. See, *e.g.*, *United States* v. *Hatter*, 532 U.S. 557 (2001); *United States* v. *Will*, 449 U.S. 200 (1980). "[T]he American public has understood the need and the importance of judges deciding important constitutional

issues without regard to considerations of popularity." *Williams*, 535 U.S. at 919 (Breyer, J., joined by Scalia & Kennedy, JJ., dissenting from denial of certiorari). And the Court is not being asked to decide how much judges should be paid. It is being asked only whether *Congress's* resolution of that issue in the 1989 Act can, consistent with the Compensation Clause, be rendered a dead letter by subsequent Congresses.

In any event, any unease should not obscure the long-term threat to the independence and efficacy of the Nation's judiciary. "[I]f tenure in office is made uncertain, the strength and independence judges need to uphold the rule of law—even when it is unpopular to do so—will be seriously eroded." *Chief Justice's 2006 Year-End Report*, *supra*, at 6. "[T]he real cost of not granting adequate salaries to our federal judges must be calculated, not in today's dollars, but by the drain on our judiciary that will be caused by the loss of qualified, seasoned judges." *Alito Testimony*, *supra*, at 23. A single decision involving the Compensation Clause represents a much lesser threat to the public's perception of the federal courts than having federal judges regularly leave their posts for monetary reasons—potentially to work for those who previously appeared before them.

The problem thus goes well "beyond the academic or the episodic." *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). It has evolved to the point where one of the three co-equal branches of Government "is threatened with irreparable injury." *Public Hearings*, *supra*, at 6 (comments of Justice Breyer). "The Compensation Clause helps to secure * * * judicial independence. When a case presents a serious Compensation Clause question, as this case does, [this Court] should hear and decide it." *Williams*, 535 U.S. at 921 (Breyer, J., joined

by Scalia & Kennedy, JJ., dissenting from denial of certiorari).

As the Chief Justice has noted, "[n]o doubt a judicial salary increase would be unpopular in some quarters, but Congress *** must sometimes make decisions that are unpopular in the short term to promote a greater long-term good." *Chief Justice's 2006 Year-End Report*, *supra*, at 8. So too must this Court. After so many years of neglect, "[w]e are at the point where reason commands action." *Id.* at 7. The petition should be granted.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KEVIN M. FORDE
RICHARD J. PRENDERGAST
Suite 1100
111 W. Washington St.
Chicago, Illinois 60602
(312) 641-1441

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MARTIN V. TOTARO
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Amicus Curiae
Federal Judges Association

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