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,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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May 14, 2010

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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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INTRODUCTION

The Framers of the Constitution recognized that an independent judiciary is a cornerstone of a free society, and that judicial independence hinges in part on insulating judicial compensation from the political process. Thus, the Framers specified in Article III that federal judges "shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III § 1. This case calls upon the Court to enforce that provision, and to invalidate legislation diminishing federal judicial compensation previously established by law.

The Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1716 (Nov. 30, 1989), sharply limited federal judges' ability to earn outside income, but in return established self-executing and non-discretionary cost-of-living adjustments to prevent federal judicial pay from erosion by inflation. Notwithstanding that statute, Congress withheld the promised salary adjustments in fiscal years 1995, 1996, 1997, 1999, 2007, and 2010. A divided panel of the Federal Circuit held in 2001 that such withholding did not violate the Compensation Clause, on the theory that the "Compensation" protected from diminishment by the Clause was limited to amounts previously earned or received by federal judges, not amounts previously established by law. *See Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001). Under this view, Congress is always free to repudiate laws fixing future judicial compensation, and can *never* assure sitting and prospective judges that their salaries will be protected from erosion by inflation. Over the spirited

dissent of three Justices, this Court denied certiorari. *See Williams v. United States*, 535 U.S. 911 (2002) (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari).

Petitioners, seven current and former Article III judges, respectfully disagree with the Federal Circuit's decision in *Williams*, and brought this lawsuit as a vehicle to overturn it. Both the trial court and the Federal Circuit ruled against petitioners as a matter of law based on the *Williams* precedent, so the fate of that decision is once again squarely before this Court. While there are few matters more delicate for judges to decide than those involving judicial pay, there are also few matters more vital to judicial independence and integrity. The issue whether Congress can withhold self-executing and non-discretionary judicial salary adjustments previously established by law should be resolved by this Court, not a divided panel of the Federal Circuit. Accordingly, petitioners respectfully request a writ of certiorari.

OPINIONS BELOW

The Federal Circuit's unreported order summarily affirming the dismissal of petitioners' complaint is reprinted in the Appendix ("App.") at 1-5a. The Federal Circuit's decision denying a petition for initial hearing *en banc* is reported at 592 F.3d 1326 and reprinted at App. 6-16a. The Court of Federal Claims' unreported order granting the United States' motion to dismiss petitioners' complaint is reprinted at App. 17-19a.

JURISDICTION

The Federal Circuit both denied petitioners' petition for initial hearing *en banc* and granted their alternative motion for summary affirmance on January 15, 2010. App. 4a, 7a. On March 23, 2010, the Chief Justice extended the time within which to file this petition until May 14, 2010. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III provides in relevant part:

> 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.

U.S. Const. art. III § 1.

The judicial salary adjustment provisions of the U.S. Code provide in relevant part:

> **§ 461. Adjustments in certain salaries**
>
> (a)(1) Subject to paragraph (2), effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5303 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if

midway between multiples of $100, to the next higher multiple of $100) equal to the percentage of such salary rate which corresponds to the most recent percentage change in the ECI (relative to the date described in the next sentence), as determined under section 704(a)(1) of the Ethics Reform Act of 1989. The appropriate date under this sentence is the first day of the fiscal year in which such adjustment in the rates of pay under the General Schedule takes effect.

(2) In no event shall the percentage adjustment taking effect under paragraph (1) in any calendar year (before rounding), in any salary rate, exceed the percentage adjustment taking effect in such calendar year under section 5303 of title 5 in the rates of pay under the General Schedule.

(b) Subsection (a) shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office.

28 U.S.C. § 461.

Revision in Method by Which Annual Pay Adjustments for Certain Executive, Legislative, and Judicial Positions Are to Be Made

Section 704(a) of Pub. L. 101-194 provided that:

(a) Percent change in the Employment Cost Index.—

(1) Method for computing percent change in the ECI.—

(A) Definitions.—For purposes of this paragraph—

(i) the term "Employment Cost Index" or "ECI" means the Employment Cost Index (wages and salaries, private industry workers) published quarterly by the Bureau of Labor Statistics; and

(ii) the term "base quarter" means the 3-month period ending on December 31 of a year.

(B) Method.—For purposes of the provisions of law amended by paragraph (2), the "most recent percentage change in the ECI", as of any date, shall be one-half of 1 percent less than the percentage (rounded to the nearest one-tenth of 1 percent) derived by—

(i) reducing—

(I) the ECI for the last base quarter prior to that date, by

(II) the ECI for the second to last base quarter prior to that date,

(ii) dividing the difference under clause (i) by the ECI for the base quarter referred to in clause (i)(II), and

(iii) multiplying the quotient under clause (ii) by 100, except that no percentage

change determined under this paragraph shall be—

(I) less than zero; or

(II) greater than 5 percent.

5 U.S.C. § 5318 note.

Specific Congressional Authorization Required for Salary Increases for Federal Judges and Justices of the Supreme Court

Pub. L. 97-92, § 140, Dec. 15, 1981, 95 Stat. 1200, as amended Pub. L. 107-77, Title VI, § 625, Nov. 28, 2001, 115 Stat. 803, provided that:

Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: *Provided*, That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or of any Justice of the Supreme Court. This section shall apply to fiscal year 1981 and each fiscal year thereafter.

28 U.S.C. § 461 note.

STATEMENT OF THE CASE

A. The Ethics Reform Act of 1989

This case arises out of the Ethics Reform Act of 1989, which substantially overhauled federal judicial compensation. On the one hand, the Act sharply limits federal judges' ability to earn outside income. *See* 5 U.S.C. app. §§ 501(a), 501(b), 502. On the other hand, the Act provides federal judges with self-executing and non-discretionary cost-of-living adjustments to protect their salaries from diminishment by inflation in future years. *See* 28 U.S.C. § 461(a). Needless to say, these provisions—which stem from the recommendations of a bipartisan congressional Task Force on Ethics—are "interrelated." 135 Cong. Rec. S29,686 (1989) (statement of Sen. Mitchell); *see also* 135 Cong. Rec. H29,484 (1989) (statement of Rep. Martin) ("The Ethics Reform Act of 1989 is a comprehensive and interrelated package that either rises or falls on its merits—one bill, indivisible."); 135 Cong. Rec. H30,754 (1989) (Task Force Report) ("The task force wishes to emphasize that it considers the salary provisions of its recommendations to be an integral part of the total ethics package being proposed.").

As a result of the 1989 Act, the law specifies that "each [federal judicial] salary rate ... *shall* be adjusted by an amount ... as determined under section 704(a)(1)" of the Act. 28 U.S.C. § 461(a)(1). (emphasis added). Section 704(a)(1), in turn, provides that federal judicial salaries are to be adjusted annually by reference to the Employment Cost Index (ECI), a measure of private-sector salaries published by the Bureau of Labor Statistics. *See id.*; *see also* 5 U.S.C. § 5318 note. In any given

year, federal judicial salaries are to be adjusted by the ECI minus 0.5%, as long as that adjustment does not exceed either (1) the annual salary adjustment, if any, for General Schedule (GS) employees (*i.e.*, federal civil servants), or (2) 5%. *See id.*; *see also* 28 U.S.C. § 461(a)(2). By law, GS employees are entitled to automatic annual salary adjustments to compensate for inflation unless the President determines that there is either (1) a "national emergency," or (2) "serious economic conditions affecting the general welfare." 5 U.S.C. § 5303(b)(1). The upshot of this scheme is that federal judicial salaries must be adjusted annually whenever *both* the average private-sector employee *and* the average federal civil servant also see their salaries adjusted.

The 1989 Act took effect on January 1, 1991, and federal judicial salaries were duly adjusted as required by the Act for each of the first three fiscal years (1991, 1992, and 1993). For fiscal year 1994, the President denied GS employees a salary adjustment by invoking the statutory exception for "serious economic conditions affecting the general welfare" (namely, a massive federal budget deficit). *See* Pub. L. 103-123, Title V, § 517B, 107 Stat. 1226, 1253 (Oct. 28, 1993) (FY 1994).

For each of the three next fiscal years (1995, 1996, and 1997), however, the judicial salary adjustments dictated by the 1989 Act did not take effect, even though in each of those years the salaries of GS employees were adjusted. That happened because, in each of those years, Congress included language in appropriations legislation stating that, other laws to the contrary notwithstanding, the salaries of federal judges would not be adjusted. *See*

Pub. L. 103-329, § 630(a)(2), 108 Stat. 2382, 2424 (Sept. 30, 1994) (FY 1995); Pub. L. 104-52, § 633, 109 Stat. 468, 507 (Nov. 19, 1995) (FY 1996); Pub. L. 104-208, § 637, 110 Stat. 3009, 3009-364 (Sept. 30, 1996) (FY 1997). Congress subsequently allowed the judicial salary adjustments established by the 1989 Act to take effect for fiscal years 1998, 2000, and 2001, but blocked the adjustments for fiscal year 1999. *See* Pub. L. 105-277, § 621, 112 Stat. 2681, 2681-518 (Oct. 21, 1998) (FY 1999).

B. The *Williams* Litigation and Aftermath

In 1997, a group of Article III federal judges filed a putative class action against the United States in the U.S. District Court for the District of Columbia. The plaintiffs alleged that the legislation withholding the salary adjustments established by the 1989 Act in fiscal years 1995, 1996, and 1997 diminished their compensation in violation of Article III. As relief, plaintiffs sought both backpay and declaratory relief under the so-called Little Tucker Act, 28 U.S.C. § 1346(a)(2).

The district court (Penn, J.), with the acquiescence of the United States, certified non-opt-out classes under Fed. R. Civ. P. 23(b)(2) of all persons who had served as Article III federal judges during each of the three years in which Congress withheld the salary adjustments due under the 1989 Act (*i.e.*, from January 1, 1995 through December 31, 1997). *See Williams* Class Cert. Order (8/20/98), App. 32-34a. The court never determined that the plaintiffs' claims for declaratory relief predominated over their claims for monetary relief, and never notified the absent class members that the litigation could affect their rights in any way. *See id.*

The district court subsequently granted the *Williams* plaintiffs summary judgment on the ground that they had a "vested" right to the future salary adjustments established by the 1989 Act, and that Congress therefore had violated the Compensation Clause of Article III by withholding those adjustments. *See Williams v. United States*, 48 F. Supp. 2d 52 (D.D.C. 1999). Shortly thereafter, the *Williams* plaintiffs filed a companion lawsuit challenging the withholding of the salary adjustments established by the 1989 Act for fiscal year 1999. The district court certified a non-opt-out plaintiff class in the new case as well, *see* Order Certifying Class, *Williams v. United States*, No. 99-1982, Dkt. 11 (D.D.C. Sept. 28, 1999), and thereafter once again entered judgment in the plaintiffs' favor.

A sharply divided panel of the Federal Circuit reversed. *See Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001). The panel majority held that this Court's decision in *United States v. Will*, 449 U.S. 200 (1980), foreclosed the judges' claims as a matter of law. *See id.* at 1035. According to the *Williams* majority, *Will* (which involved a different statutory scheme) established the bright-line rule that "Compensation" under Article III can never become "vested" (and thus constitutionally immune from diminishment) unless and until that compensation has become "'part of the compensation due and payable' to judges." *Id.* at 1032 (quoting *Will*, 449 U.S. at 229). Under this view, Congress is always free to revoke any judicial salary adjustments previously established by law, no matter how definite or precise, as long as the judges have not yet earned or received their adjusted salaries. Judge Plager dissented, asserting that "[i]t is wrong to conclude, as

my colleagues do, that the Supreme Court's decision in [*Will*] ... compels us to deny the legislatively decreed [salary adjustments] under the 1989 Ethics Reform Act." *Id.* at 1040 (dissenting opinion).

The Federal Circuit declined to review the case *en banc*, asserting that "[i]f we have incorrectly read the *Will* opinion, the Supreme Court will have the opportunity to correct the error." *Williams v. United States*, 240 F.3d 1366 (Fed. Cir. 2001) (statement, joined by a majority of the *en banc* court, concurring in order denying *en banc* review). Three judges dissented from the Federal Circuit's refusal to review the case *en banc*. *See Williams v. United States*, 264 F.3d 1089, 1090-93 (Fed. Cir. 2001) (Mayer, C.J., joined by Newman and Rader, JJ.); *id.* at 1093-94 (Newman, J., joined by Mayer, C.J. and Rader, J.).

Over the dissent of three Justices, this Court then declined to review the divided panel decision in *Williams*. *See Williams v. United States*, 535 U.S. 911 (2002) (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari). The dissenting opinion noted that the Federal Circuit majority "did not reject [the plaintiff judges'] argument directly on the merits," but instead "wrote that *this* Court had rejected the argument" in *Will*. *See id.* at 916 (emphasis added). The dissenting opinion further noted, however, that the plaintiff judges "offer a strong argument distinguishing *Will* in terms of the Compensation Clause's basic, expectations-related purpose," insofar as "*Will* involved a set of interlocking statutes which, in respect to future cost-of-living adjustments, were neither definite nor precise." *Id.* at 917. Thus, the dissenters declared, the plaintiff judges "have raised

an important constitutional question, the answer to which at present is uncertain." *Id.* at 919. And because "[t]he Compensation Clause helps to secure ... judicial independence," the dissenters maintained, "we should hear and decide" the case. *Id.* at 921.

After the Federal Circuit decided *Williams*, but before this Court denied review, Congress enacted legislation purporting to revive a 1981 appropriations rider (commonly known as Section 140) that had expired in 1982. *See Williams*, 240 F.3d at 1026-27 (holding that Section 140 expired in 1982); Pub. L. 107-77, Title VI, § 625, 115 Stat. 748, 803 (Nov. 28, 2001), *codified in relevant part at* 28 U.S.C. § 461 note (amending Section 140 to specify that "[t]his section shall apply to fiscal year 1981 *and each fiscal year thereafter*") (emphasis added). Section 140 stated that "[n]otwithstanding any other provision of law or of this joint resolution [Pub. L. 97-92], none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution [Dec. 15, 1981], any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted ...." Pub. L. 97-92, § 140, 95 Stat. 1183, 1200 (Dec. 15, 1981). Although the 2001 legislation purported to revive Section 140, it did not purport to amend or repeal the 1989 Act.

In the years since *Williams*, Congress enacted legislation allowing federal judges to receive the salary adjustments established by the 1989 Act for fiscal years 2002, 2003, 2004, 2005, 2006, 2008, and 2009. *See* Pub. L. 107-77, Title III, § 305, 115 Stat. 748, 783 (Nov. 28, 2001) (FY 2002); Pub. L. 108-6,

§ 1, 117 Stat. 10, 10 (Feb. 13, 2003) (FY 2003); Pub. L. 108-167, § 1, 117 Stat. 2031, 2031 (Dec. 6, 2003) (FY 2004); Pub. L. 108-491, § 1, 118 Stat. 3973, 3973 (Dec. 23, 2004) (FY 2005); Pub. L. 109-115, Div. A. Title IV, § 405, 119 Stat. 2396, 2470 (Nov. 30, 2005) (FY 2006); Pub. L. 110-161, Div. D, Title III, § 305, 121 Stat. 1844, 1989 (Dec. 26, 2007) (FY 2008); Pub. L. 111-8, Title III, § 310, 123 Stat. 524, 649 (Mar. 11, 2009) (FY 2009) (retroactive to Jan. 1, 2009). Those salary adjustments, however, were calculated by reference to base compensation that did not reflect prior salary adjustments due under the 1989 Act but withheld. And for fiscal years 2007 and 2010, Congress failed to enact any authorizing legislation, so federal judges received no salary adjustments, even though federal civil servants did receive salary adjustments in those years.

C. This Lawsuit

Petitioners here are seven current and former federal judges appointed pursuant to Article III. *See* Compl., App. 20-31a. Petitioners brought this action against the United States in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, alleging that Congress violated the Compensation Clause by withholding the salary adjustments established by the 1989 Act in 2007 (within the applicable six-year statute of limitations, *see* 28 U.S.C. § 2501), and by calculating the salary adjustments due in other years by reference to base compensation that did not include other salary adjustments due under the 1989 Act but wrongfully withheld. *See* App. 24-29a.

The complaint acknowledged that the *Williams* precedent foreclosed the Court of Federal Claims

from granting petitioners any relief, and that the point of this lawsuit was to challenge that precedent on appeal. *See* App. 20-21a, 27-28a. The United States also acknowledged that the case could be dismissed on the basis of the *Williams* precedent, and that is precisely what the Court of Federal Claims (Hodges, J.) did. *See* App. 18a ("The parties agree that we must dismiss plaintiffs' Complaint in light of the *Williams* precedent."). Accordingly, the Court of Federal Claims expressly declined to reach any of the alternative grounds for dismissal advanced by the United States. *See id.*

Petitioners appealed to the Federal Circuit, and moved for initial hearing *en banc* or, in the alternative, summary affirmance. Once again, petitioners acknowledged that their claims were foreclosed by the *Williams* precedent, and urged the *en banc* Federal Circuit to reconsider that precedent. Over the dissent of four judges, the Federal Circuit denied the petition for initial hearing *en banc*. *See* App. 6-7a. Chief Judge Michel, joined by Judge Lourie and Judge Moore, dissented on the ground that the case presents issues of "'exceptional importance,'" regarding "the Compensation Clause and the independence of the judiciary as a separate and equal Branch." App. 8a (opinion dissenting from denial of hearing *en banc*) (quoting Fed. R. App. P. 35(a)(2)); *see also* App. 8-9a ("I would have preferred that we shouldered our responsibility as the reviewing court for the Court of Federal Claims to consider the appeal on the merits, which requires revisiting *Williams*, whether or not we ultimately upheld it."). Judge Newman filed a separate dissent, noting that "it behooves us to accept the appeal *en banc*" because "this court's decision in *Williams* has

affected the entire judiciary," and "appear[s] to reflect continuing departure from constitutional principles, and to encroach on the fundamentals of judicial independence." App. 15-16a (opinion dissenting from denial of hearing *en banc*).

Concurrent with the denial of initial hearing *en banc*, a panel of the Federal Circuit granted petitioners' alternative motion for summary affirmance. *See* App. 1-5a. As the panel explained, petitioners acknowledged that their claims were foreclosed by the *Williams* precedent as a matter of law, so that panel review was futile. App. 2-3a. The panel also noted that the United States did not oppose summary affirmance on the basis of the *Williams* precedent (although the United States continued to press alternative grounds for affirmance). App. 3a. Given the denial of the petition for initial hearing *en banc*, the panel concluded that the judgment must be affirmed based on the *Williams* precedent. "The parties agree, and we must also agree, that *Williams* controls the disposition of this matter. Thus, we grant the motion for summary affirmance." App. 4a. Judge Mayer concurred to note that he "continue[s] to believe *Williams* ... was wrongly decided" for the reasons set forth in his dissent from the denial of *en banc* review in that case, but did not perceive any basis for the Federal Circuit to revisit the matter. App. 5a.

This petition follows.

REASON FOR GRANTING THE WRIT

The Compensation Clause Of Article III Prevents Congress From Withholding The Future Judicial Salary Adjustments Established By The Ethics Reform Act Of 1989.

This case presents an important issue under the Compensation Clause of Article III, which the Framers included in the Constitution as a bulwark of judicial independence integral to the separation of powers. *See, e.g., Will*, 449 U.S. at 217-21; *O'Donoghue v. United States*, 289 U.S. 516, 530-34 (1933). Indeed, the key constitutional insights relevant here were penned by Alexander Hamilton in *The Federalist Papers* over two centuries ago. As Hamilton explained, "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." The Federalist No. 79, p. 472 (C. Rossiter ed., 1961). Indeed, "[i]n the general course of human nature, *a power over a man's subsistence amounts to a power over his will*." *Id.* (emphasis in original).

The Framers were perfectly aware of inflation, and for that reason declined to fix judicial salaries directly in the Constitution. "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 in the Constitution inadmissible." *Id.* at 473. Thus, the Constitution "leave[s] it to the discretion of the legislature" to establish judicial compensation. *Id.* But that discretion is not unfettered: once Congress has established such compensation by law, it may not subsequently diminish it.

The whole point of the Compensation Clause, in short, is to "put it out of the power" of Congress "to change the condition of [judges] for the worse." *Id.* An Article III federal judge must "be sure of the ground upon which he stands, and ... never be deterred from his duty by the apprehension of being placed in a less eligible situation." *Id.* "In a nutshell, the Founders created a one-way compensation ratchet because they believed that permitting the legislature to diminish judicial compensation would allow the legislature to threaten judicial independence." *Williams*, 535 U.S. at 914 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari); *see also United States v. Hatter*, 532 U.S. 537, 567-69 (2001); *id.* at 582-86 (Scalia, J., concurring in part and dissenting in part); *Will*, 449 U.S. at 217-21; *O'Donoghue*, 289 U.S. at 530-34.

This Court should resolve the constitutional question presented here in light of these insights. The Ethics Reform Act of 1989 established the "Compensation" that federal judges "shall ... receive for their Services." U.S. Const. Art. III § 1. In particular, that Act *mandates* a specified judicial salary adjustment in those future years in which the salaries of *both* the average private-sector employee *and* the average federal civil servant are adjusted to compensate for inflation. *See* 28 U.S.C. § 461(a). The subsequent legislation blocking those salary adjustments "diminished" the judges' "Compensation" during their "Continuance in Office" in manifest violation of Article III. *See, e.g.*, *Evans v. Gore*, 253 U.S. 245, 254 (1920) ("[To] withhold or take from the judge a part of that which has been *promised by law* for his services must be regarded as

within the prohibition [of the Compensation Clause].") (emphasis added), *overruled in part on other grounds, Hatter*, 532 U.S. at 567; *United States v. More*, 3 Cranch (7 U.S.) 159, 161 (C.C.D.C. 1803) (Cranch, J., joined by Marshall, C.J.) ("[I]f [a judge's] compensation has once been *fixed by law*, a subsequent law for diminishing that compensation ... cannot affect [a sitting judge] ...."), *writ of error dism'd for want of jurisdiction*, 3 Cranch (7 U.S.) 159, 172-74 (1805).

The regime of self-executing and non-discretionary salary adjustments established by the 1989 Act is not undone by the fact that the President can, in narrowly defined and extraordinary circumstances, withhold a salary adjustment for federal civil servants (and thus a corresponding salary adjustment for federal judges). *See* 28 U.S.C. § 461(a)(2); 5 U.S.C. § 5303(b)(1). To the contrary, the 1989 Act gave Article III judges every reason to expect that they would receive the future salary adjustments established by law. And conversely, the 1989 Act gave Article III judges no reason to curry favor with the political branches to receive the future salary adjustments established by law.

The decision below (relying on the Federal Circuit's earlier decision in *Williams*), however, rejected petitioners' claim. *See* App. 3-4a. The divided panel in *Williams* held that Congress is free to withhold the future judicial salary adjustments established by the 1989 Act to the extent that those adjustments have not yet become part of judicial salaries already earned or received. *See* 240 F.3d at 1027-35. The *Williams* panel majority identified nothing in the text, structure, or history of Article III

limiting the "Compensation" protected from diminishment by Article III to compensation already earned or received, as opposed to future compensation established by law. If the *Williams* panel majority is correct, then Congress can *never* establish a compensation system to protect Article III judges from future inflation that cannot be undone by a future Congress, and Congress can never give sitting or prospective federal judges any reasonable expectations regarding future compensation. In essence, the *Williams* panel majority gutted the 1989 Act, which sought to insulate federal judicial compensation from the political process by establishing a system of self-executing and non-discretionary adjustments.

The *Williams* panel majority did not deny that its ruling was "regrettable," 240 F.3d at 1040, but asserted that the ruling was dictated by a "clear and simple rule" ostensibly laid down by this Court in *Will*: Congress is always free to "repeal ... a statutorily-mandated judicial pay increase" as long as it does so "before the date that the pay increase becomes actually 'due and payable' as part of the judges' compensation package," *id.* at 1029 (quoting 449 U.S. at 229). With all respect, that assertion reflects an overreading of this Court's unanimous opinion in *Will*.

Will, like this case, involved judicial salary adjustments, but the statutory scheme at issue there differed markedly from this one. That case involved the Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. 94-82, 89 Stat. 419 (Aug. 9, 1975), which provided for high-level Executive, Legislative, and Judicial officials (including Article III judges) to

receive the same annual salary adjustments as federal civil servants. *See Will*, 449 U.S. at 203. But the salaries of federal civil servants were not then subject to self-executing and non-discretionary annual adjustments. Rather, under the Federal Pay Comparability Act of 1970, the President was required every year to designate an agent to compare federal salaries to private-sector salaries. *See id.* at 203-04. That agent was then required to submit a report to the President recommending (or not) federal salary adjustments. *See id.* at 204. A separate Advisory Committee on Federal Pay would then review that report and make its own independent recommendations to the President. *Id.* After reviewing the recommendations of the agent and the Advisory Committee, the President could then adjust federal salaries, or decline to do so if he determined that economic conditions or a national emergency would make an adjustment inappropriate. *Id.* If the President declined to adjust federal salaries, he would then submit an alternative plan to Congress, which would control in the absence of a legislative veto by either House of Congress (this was before *INS v. Chadha*, 462 U.S. 919 (1983)).

Under this Rube Goldberg system, federal civil service salaries were adjusted for inflation in four fiscal years, but Congress passed (and the President signed) legislation withholding corresponding adjustments for high-level Executive, Legislative, and Judicial officials (including Article III judges). *See Will*, 449 U.S. at 205-09. In two of those four years, the withholding legislation was signed *after* the beginning of the fiscal year in question, *i.e.* after Article III judges had already started earning their

adjusted salaries. *See id.* In the other two years, in contrast, the withholding legislation was signed *before* the beginning of the fiscal year in question. *See id.*

This Court held that the withholding legislation violated the Compensation Clause in the two years in which it was enacted after the judges had begun earning their adjusted salaries, but not in the two years in which it was enacted before then. *See id.* at 224-31. That result is entirely unremarkable: under the statutory scheme at issue in *Will*, future salary adjustments for judges (just like for federal civil servants) were discretionary, not mandatory, and thus akin to no more than "an announced future intent" to adjust compensation. *Id.* at 228.

The Federal Circuit panel majority in *Williams*, however, described the statutory scheme at issue in *Will* as "strikingly similar" to the one at issue here, and characterized the judicial salary adjustments at issue in *Will* as "automatic." 240 F.3d at 1027-30. But that is simply not so; there was nothing "automatic" about the judicial salary adjustments at issue in *Will* insofar as they were based on civil service salary adjustments that (at that time) were entirely discretionary. Now, in sharp contrast, civil service salary adjustments are self-executing and non-discretionary, and can be withheld *only* in the extraordinary event that the President determines that there is either (1) a "national emergency," or (2) "serious economic conditions affecting the general welfare," 5 U.S.C. § 5303(b)(1). *See, e.g.*, *Williams*, 535 U.S. at 917 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari) (noting that "the civil service statute [in *Will*], unlike

[the 1989 Act], was imprecise as to amount and uncertain as to effect"). Indeed, the self-executing and non-discretionary adjustment provisions of the 1989 Act can only be understood as a repudiation of the previous unsatisfactory regime.

While there is language in *Will* supporting the *Williams* panel majority's conclusion that the *timing* of a judicial salary adjustment, rather than the *definitiveness* of a judicial salary adjustment, is dispositive, *see, e.g.*, 449 U.S. at 229, that language must be understood in context. In *Will*, the future judicial salary adjustments were so wholly imprecise and indefinite that they did not become part of the judicial "Compensation" protected by Article III until they actually took effect. The *Will* Court did not have before it, and hence had no occasion to consider, a system of self-executing and non-discretionary future judicial salary adjustments—much less such a system designed to mitigate corresponding limitations on federal judges' outside income. Certainly, the *Will* Court should not be deemed to have conclusively resolved an important constitutional question not presented in that case.

Indeed, three Justices of this Court have already opined that "the Court in *Will* did not focus on this question." *Williams*, 535 U.S. at 918 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari). As these Justices put it:

> To read [*Will*] as the lower court read it would render ineffectual any congressional effort to protect judges' real compensation, even from the most malignant hyperinflation, Hamilton's views to the contrary notwithstanding. Indeed, that reading would

> permit legislative repeal of even the most precise and definite salary statute—any time before the operative fiscal year in which the new nominal salary rate is to be paid. I very much doubt that the Court in *Will* intended these consequences.

Id. Because this Court need not construe *Will* to impose the bright-line constitutional rule perceived by the Federal Circuit in *Williams*, this Court need not decide whether *Will*, as so construed, is faithful to Article III.

Petitioners respectfully urge this Court to grant certiorari in this case to resolve whether Congress may, consistent with the Compensation Clause, withhold the future judicial salary adjustments established by the 1989 Act. The proper resolution of that issue affects the federal judiciary's ability not only to safeguard its independence from the political branches, but also to retain and attract the most qualified and diverse members. *See, e.g.*, *Hatter*, 532 U.S. at 568; *Will*, 449 U.S. at 220-21.

Nor is there any prudential reason for this Court to abstain from addressing the "important" constitutional question presented in this case. *Williams*, 535 U.S. at 911, 919, 922 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari). In particular, contrary to the United States' arguments below, the 2001 legislation purporting to revive Section 140 in no way diminishes the importance of that question. Putting aside the fact that the 2001 legislation cannot possibly affect the Compensation Clause claims of Article III judges (like petitioners) sitting prior to its

enactment, Section 140 has no bearing here by its plain terms.

That provision, originally enacted in 1981, allows judicial salary adjustments "specifically authorized by Act of Congress hereafter enacted." Pub. L. No. 97-92, § 140, 95 Stat. 1200 (Dec. 15, 1981). The 1989 Act, which authorized self-executing and non-discretionary judicial salary adjustments, is precisely such an "Act of Congress hereafter enacted." *See, e.g.*, *Williams*, 535 U.S. at 918-19 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari); *Williams*, 240 F.3d at 1027; *cf. Boehner v. Anderson*, 30 F.3d 156, 161-62 (D.C. Cir. 1994) (holding that the 1989 Act's self-executing and non-discretionary salary adjustments for Members of Congress did not violate the Twenty-Seventh Amendment, because those adjustments took effect automatically under the Act). Indeed, a major objective of the 1989 Act was to free federal judges and other senior federal officials from "riders to appropriations bills to deny them [cost-of-living adjustments] when other Federal employees receive theirs." 135 Cong. Rec. H30,753 (1989).

Moreover, construing Section 140 to nullify the judicial salary adjustments established by the 1989 Act would render Section 140 unconstitutional (or, at the very least, raise serious constitutional questions). Congress, after all, cannot constitutionally single out judicial pay for a special legislative burden. *See, e.g.*, *Williams*, 535 U.S. at 918-19 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari) (citing *Hatter*, 532 U.S. at 564).

Nor, again contrary to the United States' arguments below, are petitioners foreclosed from

challenging *Williams* under the doctrine of collateral estoppel. As an initial matter, that doctrine is not jurisdictional, so it was entirely appropriate (as the United States acknowledged below) for the lower courts to address the merits first, and it is entirely appropriate for this Court to do the same thing.

In any event, the collateral estoppel argument raised by the United States below itself presents constitutional issues of the first order, given that the United States sought to extinguish petitioners' claims for monetary relief by virtue of their putative status as absent members of a non-opt-out class certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure. *See Williams* Class Cert. Order, App. 32-34a. The district court in *Williams* never determined that the plaintiffs' claims for declaratory relief predominated over their claims for monetary relief, *see id.*—nor could it possibly have so determined, because the declaratory relief requested itself involved the payment of money. If due process means anything, it means that judicial proceedings cannot extinguish the monetary claims of absent class members who were never notified that those proceedings could extinguish their claims or allowed to opt out. *See generally Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted*, 510 U.S. 810 (1993), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994) (*per curiam*); *Johnson v. General Motors Corp.*, 598 F.2d 432, 437 (5th Cir. 1979); *Bogard v. Cook*, 586 F.2d 399, 408-09 (5th Cir. 1978).

Events since *Williams*, moreover, have only underscored the need for this Court to address this issue. To the extent there was any expectation at the time of *Williams* that "over time Congress will deal with the decline in judicial compensation, making good on the 1989 Act's inflation-adjustment promise," *Williams*, 535 U.S. at 919 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari), any such expectation has proven ill-founded. Not only has Congress failed to address the ongoing decline of real judicial salaries, but Congress once again withheld the salary adjustments established by the 1989 Act in 2007 and 2010. Indeed, every year brings high political drama as Congress decides whether to authorize the judicial salary adjustments established by the 1989 Act, necessarily putting the federal judiciary in precisely the mendicant position that the Compensation Clause abhors and the 1989 Act was designed to prevent.

In addition, this issue is not subject to further review in the lower courts, given that all claims for judicial pay must go through the Federal Circuit, either through the Tucker Act, 28 U.S.C. § 1491, or the Little Tucker Act, 28 U.S.C. § 1346(a)(2), and the Federal Circuit in this case expressly declined the opportunity to revisit *Williams*, over the dissent of four judges, *see* App. 6-16a. It is now clear that, unless and until this Court intervenes, the Federal Circuit's divided panel decision in *Williams* will remain the law of the land.

Finally, petitioners, as federal judges themselves, recognize the sensitivity of judicial consideration of matters involving judicial pay. But there is no

escaping the fact that no one *except* Article III judges can resolve this constitutional issue. *See, e.g.*, *Will*, 449 U.S. at 211-17. Given that "the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary," *id.* at 217, it is both necessary and appropriate for this Court to resolve the important Compensation Clause issue presented here. "[I]t is not extravagant to say that there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish [judicial] compensation, not for his private advantage—which, if that were all, he might willingly forego—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people." *O'Donoghue*, 289 U.S. at 533. Proper resolution of this issue is critical not only to "secur[ing] an independence of mind and spirit necessary if judges are 'to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty,'" *Hatter*, 532 U.S. at 568 (quoting Woodrow Wilson, *Constitutional Government in the United States* 143 (1911)), but also to attracting and retaining "'learned'" federal judges, *id.* (quoting 1 James Kent, *Commentaries on American Law* *294).

It bears emphasis, in this regard, that petitioners are not asking this Court to increase federal judicial salaries. Rather, petitioners are merely asking this Court to enforce "a *congressional* decision in 1989 to protect federal judges against undue diminishment in real pay by providing cost-of-living adjustments to

guarantee that their salaries would not fall too far behind inflation." *Williams*, 535 U.S. at 920 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari; emphasis modified); *see also id.* at 921 ("The question in the present case is whether th[e] [Compensation] Clause offers protection when Congress *chooses* to promise a stable purchasing power.") (emphasis in original); *cf. United States v. Winstar Corp.*, 518 U.S. 839 (1996) (recognizing that Congress does not have unfettered discretion to repudiate prior legal commitments). The 1989 Act promised an important degree of insulation between federal judicial compensation and the political process, and petitioners respectfully call upon this Court to restore that promise.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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May 14, 2010