No. 09-1395

IN THE

Supreme Court of the United States

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

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 *AMICI CURIAE* BAR ASSOCIATIONS IN SUPPORT OF PETITIONERS

SCOTT M. MCCALEB
1620 I Street N.W.
Suite 900
Washington, D.C. 20006
(202) 558-2421
Counsel for FCBA

CARTER G. PHILLIPS
VIRGINIA A. SEITZ*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
vseitz@sidley.com
Counsel for Amici Curiae

* Counsel of Record

June 14, 2010

[Additional Counsel On Inside Cover]

LAWRENCE M. FRIEDMAN
BARNES, RICHARDSON
&COLBURN
303 East Wacker Drive
Suite 1020
Chicago, IL 60601
(312) 297-9554
Counsel for CITBA

ALAN KASPER
241 18th Street
Suite 700
Arlington, VA 22202
(703) 415-0780
Counsel for AIPLA

DOUGLAS K. NORMAN
1501 M Street, N.W.
Suite 1150
Washington, D.C. 20005
(202) 507-4500
Counsel for IPO

ERIN M. DUNSTON, ESQ.
1016 16th Street, N.W.,
Suite 101
Washington, D.C. 20036
(202) 223-6600
Counsel for the BADC

LAWRENCE R. BACA
1220 N. Fillmore
Suite 444
Arlington, VA 22201
(571) 481-9100
Counsel for FBA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

CONSTITUTIONS AND STATUTES

LEGISLATIVE HISTORY

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITIES Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

INTEREST OF *AMICI CURIAE*[1]

Amici are bar associations with a direct and substantial interest in the maintenance of a strong, independent federal judiciary. They file this brief to demonstrate that the erosion of real judicial salaries by inflation presents a substantial problem for the federal judiciary and the administration of justice. These consequences have an important constitutional dimension because the Framers embodied within Article III a vision of independent judges who serve for life and who should not be forced routinely to petition Congress for the maintenance of their compensation. Finally, *Amici* demonstrate that Congress solved this problem in the Ethics Reform Act of 1989 by entrenching judicial pay adjustments, and that subsequent attempts to reverse field violate the Compensation Clause.[2]

BACKGROUND AND SUMMARY

It "would be unhealthy, if not unseemly, were judicial service acceptable by only those of means on the one hand, and those of marginal competence on the other. The prohibition of diminution is not intended for the benefit of the judges, but to enhance the quality of justice for everyone." *Williams* v. *United States*, 264 F.3d 1089, 1090 (Fed. Cir. 2001) (Mayer, C.J., dissenting) (citing *Evans* v. *Gore*, 253 U.S. 245, 253 (1920)). If Congress cannot provide

---

[1] No person or entity other than *Amici* made a monetary contribution to this brief's preparation or submission. No counsel for a party authored this brief in whole or part or made a monetary contribution to its preparation or submission. Counsel for both parties received timely notice of and consented to the filing of this brief. The letters of consent have been filed.

[2] Individual descriptions of *Amici* are in the Appendix.

judges with a vested right to a particular real level of compensation, recruitment and retention of judges is threatened; and the Framers' plan for independent Article III judges serving for life will be seriously undermined.

This is the current state of affairs. Inflation has sharply cut real judicial pay. The erosion in the purchasing power of judicial salaries has made it increasingly difficult to attract and retain highly qualified lawyers for the bench and undermined the important concept of judicial service for life. Part I *infra.*

Congress addressed this problem through the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716. This Act provided federal judges with a vested right to future compensation that may not be diminished without violating the Compensation Clause. The Federal Circuit's contrary determination in *Williams* v. *United States*, 240 F.3d 1019 (Fed. Cir. 2001), is wrong.

Petitioners have thoroughly explained the importance of this Court's review. *Amici* embrace those arguments and will not repeat them. Instead, *Amici* focus on arguments that supplement and reinforce petitioners' arguments. In particular, we argue that *Williams*'s construction of the Ethics Reform Act is inconsistent with: 1) the Compensation Clause and its vital role in ensuring an independent judiciary; 2) this Court's treatment of other federal statutes establishing contract obligations; and 3) the common law of the vesting of future interests. As *Amici* show, Congress's decision to provide judges with an entrenched, enforceable right to a particular real level of compensation best serves the purposes of the Compensation Clause and best comports with established precedent.

ARGUMENT

I. THE PETITION CONCERNS AN ISSUE OF VITAL IMPORTANCE TO OUR CONSTITUTIONAL SYSTEM.

In the past 40 years, real judicial pay has eroded substantially, when compared to past judicial salaries. The erosion is even more dramatic when compared to the increased compensation of legal academics and lawyers in private practice.

First, real judicial compensation has fallen dramatically at all levels of the federal bench. The real value of the salaries of Supreme Court Justices fell 37.3% between 1969 and 2002. Am. Bar Ass'n & Fed. Bar Ass'n, *Federal Judicial Pay: An Update On The Urgent Need For Action* 12 (2003) (*"Am. Bar Update"*). During this same period, real pay fell 23.5% for appellate and district judges while the average American worker's real wage rose almost 20%. *Id.* at 13. Had district judges' compensation increased by the same percentage as that of average Americans, a district court judge would have made $261,300 in 2006 (compared with an actual salary of $165,200). Paul A. Volcker, Commentary, *Judgment Pay*, Wall Street J., Feb. 10, 2007, at A9.

Judicial salaries have also lost value compared to the wages earned by judges in the past. District and appellate judges sitting in this decade receive less than 80% of the real income of judges sitting in 1969. See, *e.g.*, *Am. Bar Update* 12-13.

In addition, judicial pay used to compare favorably to the compensation of law school deans and senior law professors. In 1969, district court judges making $40,000 per year earned on average 20% more than law school deans ($33,000) and 30% more than senior professors ($28,000) at top schools. Admin. Office of

the U.S. Courts, Salaries of Members of Congress and Federal Judges, *available at* http://www.uscourts.gov/JudgesandJudgeships/JudicialCompensation/PaychartsTables/SalariesofMembersofCongressAndFederalJudges.aspx (last visited June 3, 2010). The situation now is reversed. In 2006, district judges making $165,200 per year were earning 50% less than the average salary of senior professors ($330,000) and 60% less than the average salary of law school deans ($430,000) at top schools. *Id.*

The decrease in the real value of judicial compensation is particularly disturbing when contrasted with the increasing volume and complexity of cases facing federal judges today. Workloads have risen dramatically. In 1969, district courts received 110,778 civil and criminal filings with an average caseload of 339 filings per active judge. *Am. Bar Update* 18. Federal appellate courts received 10,709 filings in 1969, with an average caseload of 123 per active judge. *Id.* at 18-19. By 2009, federal district courts received 353,052 filings annually, while federal courts of appeal were receiving 57,740. See *2009 Year-End Report on the Federal Judiciary* 2-4 (2010).

Today's cases are also significantly more complex. Federal judges oversee multi-district litigation, national class action proceedings, complex intellectual property and information technology disputes, and medical science issues. *Am. Bar Update* 20. To be effective, federal judges must manage massive cases and immerse themselves in numerous disciplines at high levels of sophistication. In light of these expanding demands, judicial compensation should be going up, not down.

The decrease in the real value of judicial pay and the increase in the workload have significant, adverse

consequences. First, departures of active and senior judges from the bench over the past two decades have increased. Judges are returning to the private sector in unprecedented numbers, even though they must forgo pensions, which historically has been a significant deterrent to leaving the federal bench.

Over 100 Article III judges left the bench between 1990 and 2006. Am. Bar Ass'n, *Background Information on the Need for Federal Judicial Pay Reform* 2 (2007). The number of resignations and retirements rose sharply compared to past decades: 3 from 1958-69, 22 during the 1970s, and 41 in the 1980s. *Am. Bar Update* 21, chart G. Many judges return to private practice as mediators, firm partners or corporate general counsel. See Scott Duke Kominers, *Salary Erosion And Federal Judicial Resignation* abstract at 1 (Sept. 25, 2008), *available at* http://ssrn.com/abstract=1114432 (salary levels have a "striking effect" on judicial resignations).

Judges cite financial issues as an important reason for leaving the bench. In 2009, Judge Stephen Larson noted that the "'costs associated with raising our family are increasing significantly, while our salary remains stagnant and, in terms of purchasing power, is actually declining.'" Wall Street J. Law Blog, With Larson's Resignation, Judicial Pay Back in the News (Sept. 17, 2009, 2:56 p.m.). District Judge Kendall resigned after ten years of service due to "'financial concerns.'" Admin. Office of the U.S. Courts, *Insecure About Their Future: Why Some Judges Leave the Bench*, The Third Branch, Feb. 2002, at 1. Judge Alfred Lechner, Jr. resigned in 2001 after 15 years, forgoing any pension to reenter private practice due to his children's college costs. *Id.* Judge Edward Davis left the bench after 20 years to fund long-term care for a family member, observing:

"'We'd been assured we would receive cost-of-living increases after the pay raise in 1989. . . . Then Congress said no to the promised COLAs.'" *Id.* at 3; *Am. Bar Update* 15. See Emily Field Van Tassel, *Why Judges Resign: Influences on Federal Judicial Service* (1993) (prepared for the National Commission on Judicial Discipline and Removal) (judges mention low salary as a cause of resignation more often in recent decades).

When a judge departs the bench early, the judicial branch loses in two respects. First, the bench is deprived of the efficiency and wisdom that result from that judge's years of experience. See 135 Cong. Rec. H8732, H8759 (daily ed. Nov. 16, 1989) (Rep. Lloyd) ("This [pay raise] is particularly important to the Federal judiciary who has lost large numbers of experienced, dedicated judges in recent years who can no longer afford to stay in Government service.")

Second, a prematurely departing judge does not become a senior judge, with the attendant loss of the relatively inexpensive, valuable assistance that this cadre of judges has traditionally provided. Senior judges alleviate the burdens that swelling dockets place on active judges. See Blake Denton, *The Federal Judicial Salary Crisis*, 2 Drexel L. Rev. 152, 160 (2009). Indeed, senior judges carry almost 15% of the federal judicial workload and provide "indispensible" help to many courts. See 135 Cong. Rec. at H8760 (Rep. Moorhead). If senior judges were to cease contributing, approximately 80 additional active judges would need to be appointed, costing in excess of $45 million annually. *Id.*

Declining real salaries also impede efforts to recruit a high quality, economically diverse judiciary. The current real salary – and its routine diminution – hinders the recruiting of experienced private sector

attorneys. See, *e.g.*, *2001 Year-End Report on the Federal Judiciary* (2002); *2002 Year-End Report on the Federal Judiciary* (2003). Former White House Counsel Alberto Gonzales noted:

> "[w]e are aware of both young lawyers with family obligations and established prominent lawyers with substantial investment in their practice and community who feel that they cannot afford to go on the federal bench." [*Am. Bar Update* 23.]

See 135 Cong. Rec. at H8768 (Rep. Frenzel) ("We all can cite examples of judges who had to retire to educate their children. We all know great lawyers who cannot afford the cut in pay to become judges."); Russell Wheeler, *Changing Backgrounds of U.S. District Judges*, 93 Judicature 140, 147 (Jan.-Feb. 2010) (describing decreasing number of district court judges from private practice and "summary statistics . . . suggest[ing] that the decline in . . . buying power after 1969" was a factor).

Current circumstances also make it substantially more difficult to appoint a socioeconomically diverse bench. Judge Michael Barrage, who resigned without retirement benefits to reenter private practice, warned that the declining real salary of judges will limit service to "'people who are filthy rich and for whom salary makes no difference.'" Stephen Barr, *Lagging Judicial Pay Gives Some People Second Thoughts About Careers on the Bench*, Washington Post, Mar. 11, 2001, at C-2.

For these reasons, bar associations, national commissions and judges have been urging Congress to address judicial compensation and prevent the annual erosion of its real value. Since 1980, the American Bar Association has issued numerous

resolutions calling for increased judicial compensation. See, *e.g.*, Am. Bar Ass'n, *Federal Judicial Compensation Policies* (2007) (listing ABA resolutions related to adequate judicial compensation); AIPLA Letter to Senators Leahy and Specter, Jan. 30, 2008.

In 2003, the National Commission on the Public Service ("Volcker Commission") made recommendations to address the problem with maintaining judicial compensation, calling judicial salaries the "most egregious example of the failure of federal compensation policies." See Nat'l Comm'n On the Pub. Serv., *Urgent Business for America: Revitalizing the Federal Government for the 21st Century* 22-23 (2003).

Chief Justices Rehnquist and Roberts, too, have repeatedly noted the deleterious effects of the diminishing real value of judicial pay. See*, e.g.*, *2006 Year-End Report on the Federal Judiciary* 1 (2007). And other Justices have testified before Congress about the enduring consequences of the failure to compensate judges fairly. See, *e.g.*, Testimony of Justices Samuel Alito and Stephen Breyer Before the H. Comm. on the Judiciary, Subcomm. on the Courts, the Internet and Intellectual Property, Oversight Hearing on Federal Judicial Compensation (Apr. 19, 2007); Testimony of Justice Anthony M. Kennedy Before the United States S. Comm. on the Judiciary, Judicial Security and Independence (Feb. 14, 2007).

In sum, the sharp decrease in the real value of judicial compensation has harmful consequences and undermines the Framers' vision of judges secure in their compensation serving for life, described *infra* Part II.A. Of equal importance, each year, judges must approach Congress, hat in hand, seeking an increase in pay. This annual ritual is wholly inconsistent with the Framers' goal of judicial

independence. Judges who know that their financial well-being is subject to annual scrutiny by Congress cannot afford to ignore criticisms leveled at the judicial branch by the legislature, which is the antithesis of judicial independence.

II. THE COURT SHOULD DECIDE WHETHER ABROGATION OF THE ADJUSTMENTS MANDATED BY THE ETHICS REFORM ACT VIOLATES THE CONSTITUTION.

This Court should decide whether the Ethics Reform Act of 1989 provided federal judges with a vested right to future compensation that may not be diminished without violating the Compensation Clause. The Federal Circuit's contrary decision in *Williams* is inconsistent with the text and purposes of the Act, with the Compensation Clause and its role in properly separating the branches of government, with this Court's precedent addressing federal statutes establishing contract obligations, and with background common law principles governing the vesting of future interests.

A. Congress's Provision Of Vested Rights To A Real Compensation Level Furthers The Purposes Of The Compensation Clause.

Article III § 1 of the Constitution provides that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." The Framers understood that an independent judiciary is the best guarantor of justice – "independent . . . in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive

influence of either of the other departments." *O'Donoghue* v. *United States*, 289 U.S. 516, 530 (1933).

The Founders were also aware, based on their own experience, that judges cannot be independent if the other two branches of government control their tenure or compensation. They were thus determined "to put it out of the power of [the Legislative branch] to change the condition of the individual [judge] for the worse." *The Federalist* No. 79, at 473 (Alexander Hamilton) (Clinton Rossiter, ed. 1961). Alexander Hamilton famously begins Federalist Paper 79:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. [*Id.* at 472.]

See *id.* No. 51, at 321 (James Madison) (the "emoluments annexed to [judicial] offices" were to be protected).

The purposes of the Compensation Clause are "to attract good and competent men [and women] to the bench" and "to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice with respect to persons and with equal concern for the poor and the rich." *Evans* v. *Gore*, 253 U.S. 245, 253 (1920), *overruled on other*

grounds, *United States* v. *Hatter*, 532 U.S. 557, 567 (2001). To serve its purposes, the Clause forbids both direct and indirect diminution of judicial compensation. *Hatter*, 532 U.S. at 569. "'[A]ll which by their necessary operation and effect 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.'" *O'Donoghue*, 289 U.S. at 533 (quoting *Evans*, 253 U.S. at 254).

The Clause thus plays its part in the federal scheme by entrenching judicial compensation and assuring judges that they will receive all promised compensation during their judicial service. Judges should not be required to go "hat in hand" to the other branches to avoid having their compensation diminished.

Particularly relevant here, the Founders were fully aware that in light of judicial life tenure, the real value of judicial compensation would diminish over the course of a judge's career due to inflation. *United States* v. *Will*, 449 U.S. 200, 219-20 (1980). They were concerned that inflation's effects might undermine judicial independence.

An early "draft" of the Compensation Clause forbade both "'increase or diminution'" of judicial salary to shield judges from the temptation of salary increases and the fear of retribution. Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. Rev. 308, 312 (1976-77). Governor Morris, however, noted that increases would be necessary because inflation could erode the original salary during a judge's tenure. *Id.* at 313.

James Madison opposed Morris's amendment, fearing the judiciary curry favor with Congress to

secure higher compensation. Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, And Judicial Independence*, 56 Case W. Res. L. Rev. 965, 972 (2006). He proposed indexing judicial pay to the price of wheat or another stable value, but the Framers concluded that no such commodity could be found. Rosenn, *supra*, at 315.

Ultimately, therefore, Morris's amendment passed, and Congress received authority to make *upward* adjustments of judicial salaries. *Id.* at 314. See also *The Federalist* No. 79, at 473 (Alexander Hamilton). Congress has regularly confronted the strain resulting from this compromise. The tension among the Compensation Clause's goal of preserving judicial pay, the inflationary erosion of judicial pay, and Congress's control of judicial pay increases has placed the Legislative and Judicial branches in a constitutionally uneasy situation. Judicial pay is eroding dramatically; only Congress can address that fact. Judges, accordingly, are at the mercy of the Legislative Branch and become petitioners to Congress. The Ethics Reform Act of 1989 is the latest Congressional attempt to resolve this constitutional tension.

B. Congress's Decision To Protect Real Judicial Compensation From Inflation Should Be Enforced.

Congress, the Judicial Branch, and numerous outsiders have recognized the desirability of finding what eluded James Madison – a way to fix judicial compensation in real terms so that Congress need not regularly revisit judicial pay (and judges need not regularly petition Congress to do so). The statute at issue in *Will* – the Executive Salary Cost-of-Living Adjustment Act of 1975 ("Adjustment Act") – failed to achieve that goal. See 449 U.S. at 203-04. The

statute at issue here – the Ethics Reform Act of 1989 – emerged thereafter. The Ethics Reform Act's proponents sought legislation that would adjust judicial pay for inflation and avoid the deficiencies that had prevented the Adjustment Act from achieving its goals.

The plain language of the Ethics Reform Act requires that judges receive annual cost-of-living adjustments. Unlike the Adjustment Act, which tied salary adjustments to a *discretionary* review process, the Ethics Reform Act is phrased in mandatory terms, providing that "the annual rate of pay for positions at each level of the Executive Schedule *shall* be adjusted by an amount . . . equal to the percentage of such annual rate of pay which corresponds to the most recent percentage change in the [Employment Cost Index]." 5 U.S.C. § 5318(a). The adjustment of the pay of General Schedule ("GS") employees is the lone prerequisite for a judicial adjustment, *id*.; and this prerequisite was satisfied for each year that the Complaint places at issue in this case.

Further evidence that salary adjustments are mandatory lies in the structure of the Ethics Reform Act. It imposed substantial restrictions on the outside income of federal judges and a mandatory work load for senior judges. 5 U.S.C. app. §§ 501(a), 502; 28 U.S.C. § 460. Congress provided for mandatory salary adjustments and hence a stable salary to address the Act's permanent elimination of judges' outside income. These provisions were "'interrelated.'" See *Boehner* v. *Anderson*, 809 F. Supp. 138, 141 (D.D.C. 1992), *aff'd*, 30 F.3d 156 (D.C. Cir. 1994). See also Report of the Bipartisan Congressional Task Force on Ethics, 135 Cong. Rec., H2953, H2966 (daily ed. Nov. 21, 1989) ("*Task Force Report*") ("the salary provisions of [the] recommendations [are] an integral

part of the total ethics package being proposed. . . . Along with adequate compensation there should be less need to supplement income from outside sources.").

Moreover, the legislative history of the Ethics Reform Act demonstrates that the Act is based on the reports and recommendations of entities which advocated the removal of judicial pay adjustments from the annual political struggle over Congressional pay. The Act emerged from the above-cited Congressional Task Force on Ethics. That Report stated that "[f]ederal judges are resigning at a higher rate than ever before." *Task Force Report* H9264. It recommended that new legislation focus on inflation as the "single, most important explanation" for the disparity between government and private sector employees. *Id.* at H9265. The Report proposed a "fundamental departure from the prior system," *id.* at H9264, and adoption of a new system to ensure that cost-of-living adjustments are reliably paid. As the Report explains,

> [c]urrently, under the provisions of [the Adjustment Act], the positions under the Commission's review are *eligible* to receive adjustments in basic pay at the same rate and at the same time as the comparability adjustments for the General Schedule. This Act *provides* annual comparability adjustments for these officials. [*Id.* at H9269 (emphases supplied).]

Congress adopted the recommendations of its Task Force in the Ethics Reform Act. It sought to cure the Adjustment Act's deficiencies and establish a mechanism for the self-executing, non-discretionary indexing of future salaries to protect judges from inflation and reduce the constitutional tension inherent in the circumstances that existed prior to

1989. See also 135 Cong. Rec. at H8761 (Rep. Kastenmeier) (applauding the Task Force for recommending "automatic COLAs for judges").

Despite the text and history of the Ethics Reform Act, the Federal Circuit concluded that the Compensation Clause did not forbid Congress to block the pay adjustments promised in the Act. The court understood that Congress intended to provide for non-discretionary salary adjustments. See *Williams*, 240 F.3d at 1031. Yet it concluded, based on its reading of this Court's decision in *Will*, 449 U.S. 200, that Congress always retains the power to block promised judicial pay adjustments if it does so before a judge receives the adjusted amount in a paycheck. This ruling fundamentally misreads *Will* and the Compensation Clause.

In *Will*, this Court rejected a Compensation Clause claim based on Congress's failure to make judicial pay adjustments under the Adjustment Act. The Adjustment Act had established a relationship between adjustments to judicial pay and the adjustments to GS employees' pay under the Federal Pay Comparability Act of 1970 ("Comparability Act"). But pay adjustments under the Comparability Act were uncertain and discretionary.

Under that regime, the President was to designate an agent to compare federal salaries to private sector salaries and then submit a salary recommendation for federal pay to the President. See *Will*, 449 U.S. at 203-04. A separate Advisory Committee also reviewed that report and made its own recommendation to the President. *Id.* After review of both recommendations, the President could adjust federal salaries or decide not to do so if economic conditions or a national emergency made adjustment inappropriate. *Id.* If the President decided not to adjust

salaries, he would submit to Congress an alternative plan that would take effect unless either House of Congress legislatively vetoed the President's plan. *Id.*[3] The effective date of any pay raise under this regime was October 1 of the relevant year. *Id.*

The Adjustment Act thus authorized judicial pay adjustments of indeterminate content and based on no particular formula, depending upon the views and recommendations of two possible decision makers who had substantial discretion vis-à-vis the amount of any adjustment. See *Williams* v. *United States*, 535 U.S. 911, 917 (2002) (Breyer, J., dissenting from denial of certiorari) ("*Will* involved a set of interlocking statutes which, in respect to future cost-of-living adjustments, were neither definite nor precise."). This Court's decision that the protection of the Compensation Clause for adjustments did not vest until the "increases *take effect*" was the consequence of the specific statutory context. *Will*, 449 U.S. at 221-30.

The analysis of vesting under the 1989 Ethics Reform Act, however, must turn on its contrasting provisions. The Act raised pay, restricted honoraria, and enacted non-discretionary cost-of-living adjustments based on the ECI to ensure that real judicial compensation did not decline. There was no uncertainty about the decision maker or the formula for adjustments. Congress instead directly tied judicial pay adjustments to pay adjustments for GS employees – adjustments which have been and largely have remained virtually automatic. Put differently, Congress made both the fact and the amount of judicial pay increases as certain as it could, leaving as a safety valve only the extra-

---

[3] This scheme preceded *INS* v. *Chadha*, 462 U.S. 919 (1983).

ordinary circumstances in which virtually all federal employees, too, would be denied any adjustment. As the dissenting judges in the Federal Circuit explained, "[f]ixing future salaries by adopting an indexing plan is the same for all intents and purposes as specifying actual dollars." *Williams*, 264 F.3d at 1091 (citing *Boehner* v. *Anderson*, 30 F.3d 156, 162 (D.C. Cir. 1994) ("We see no reason whatsoever why the Congress cannot, for convenience, instead specify an index or formula with the same effect.")).

The Ethics Reform Act should be interpreted as its text and history require – to vest the judicial right to future salary adjustments and further the goals of the Compensation Clause.

C. The Vesting Of Judicial Salary Adjustments Is Consistent With This Court's Precedent And With The Compensation Clause.

1. In *Williams*, the Federal Circuit appeared to understand that Congress had sought to tie its own hands on judicial compensation, making an effort to remove the real value of judicial compensation from the ongoing political process. 240 F.3d at 1040. See also *Task Force Report* H9265 (the Ethics Act was intended to protect judges from "riders to appropriation bills to deny them COLAs when other Federal employees receive theirs"). The *Williams* court also incorrectly believed, however, that the Congress that passed the 1989 Act lacked the power to commit future Congresses to cost-of-living adjustments for judges. See 240 F.3d at 1039.

In most settings, Congress may regulate and later change its mind and the later Congress is not shackled by those prior decisions. But there exist several exceptions to this general rule – circum-

stances in which Congress creates vested rights in persons governed by a particular statute. The Compensation Clause places statutes providing self-executing, non-discretionary compensation adjustments to judges in this excepted category. That is, the Compensation Clause has the effect of entrenching a statute that creates a clear future right to judicial pay against any future congressional act that would undo that right to increased judicial compensation.

This Court's central rationale underlying the prohibition on entrenched statutes is that such laws bind the public to a policy judgment made by law makers who no longer respond to the public will or to current emergencies. See *Newton* v. *Commissioners*, 100 U.S. 548, 559 (1879). But, the Framers intended to deprive Congress of "the same power of repeal and modification which the former had of enactment" with respect to judicial compensation. *Id.*

"[T]he power of American legislative bodies . . . is subject to the overriding dictates of the Constitution and the obligations it authorizes." *United States* v. *Winstar*, 518 U.S. 839, 872 (1996) (plurality opinion). Thus, the principle that one legislature cannot bind another "has always lived in some tension with the constitutionally created potential for a legislature, under certain circumstances, to place effective limits on its successors, or to authorize executive action resulting in such a limitation." *Id.* at 873.

This Court has recognized that sovereign power to change its mind is effectively surrendered in limited circumstances where the sovereign obtains something specific in exchange for and in reliance on its commitment. "Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch* v. *United States*, 292 U.S.

571, 579 (1934) (United States may not repudiate war risk insurance contracts where the beneficiaries paid premiums). See also *Perry* v. *United States*, 294 U.S. 330 (1935) (United States cannot repudiate contracts requiring loan repayment); *Winstar*, 518 U.S. at 922-23 (Scalia, J., concurring) (United States cannot repudiate regulatory contract promising favorable treatment to bank that assumed the liabilities of a failing thrift).

Most recently, in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000), this Court held that the United States repudiated its contracts with two oil companies "when it denied them certain elements of the permission-seeking opportunities [for offshore oil exploration] that the contracts had promised." *Id.* at 607. Specifically, after the contracts were signed, Congress passed a statute that changed the terms of the bargain. The Court did "not say that the changes made by the statute were unjustified"; it said "only that they were changes of a kind that the contracts did not foresee" – "changes in those approval procedures and standards that the contracts had incorporated through cross-reference." *Id.* at 620.

These prohibitions on the repudiation of bilateral exchanges in *Winstar*, *Lynch*, *Perry* and *Mobil Oil* are founded on the Due Process Clause. The contracts at issue in those cases created expectations in the contracting parties; the private plaintiffs relied on the government's promises and those expectations and that reliance were protected by the Due Process Clause. Similarly, the Ethics Reform Act created expectations and justifiable reliance on its commitment regarding future compensation in federal judges. And, like the Due Process Clause, the Compensation Clause has an "expectation-based

purpose." *Williams*, 535 U.S. at 917 (Breyer, J., dissenting from denial of certiorari). Thus, after the 1989 Act, judges reasonably expected cost-of-living adjustments as part of their future compensation, particularly in light of the elimination of many outside sources of income. *Id.* at 911-12. Neither Congress nor federal judges would have foreseen the abrogation effected by the subsequent blocking statutes. Indeed, in the 1989 Act, Congress intended to protect judicial salaries from inflation and insulate the process from future political interference, including blocking statutes.

Williams's "reading [of vesting under the Compensation Clause] 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." *Id.* at 918 (Breyer, J., dissenting from denial of certiorari). This Court surely did not intend that consequence. *Id.* at 920 ("The Compensation Clause assures judges that, once Congress has made a decision, a later Congress cannot overturn it.").

2. In *Williams*, the Federal Circuit recognized that the application of "garden-variety future interests" law would result in a holding that the right to future compensation vested here. See 240 F.3d at 1038. The *Williams* court, however, believed that in *Will*, this Court had chosen to "depart[] from traditional vesting rules" and had adopted a rule of "actual possession" for vesting under the Compensation Clause. *Id.* at 1032.

The Federal Circuit misunderstood the holding in *Will*. This Court did not depart from traditional vesting rules in *Will*; it applied them and found the Adjustment Act insufficient to create vested rights. Under established law, in order for a future interest

to vest, two conditions must be satisfied: the future owner must be identified, and there must be sufficient certainty that property will transfer. See, *e.g.*, William Blackstone, 2 *Commentaries* *168; Lewis M. Simes & Allan F. Smith, *The Law of Future Interests* § 65, at 54-55 (2d ed. 1956). In *Will*, this Court decided only that the Adjustment Act's process for arriving at a salary increase created future interests that were too uncertain in scope and amount to vest. The Court thus did not jettison the background common law principles governing the vesting of future interests that is the most natural way of construing the Compensation Clause.

Moreover, the legal prerequisites for the vesting of future interests are plainly satisfied by the Ethics Reform Act. As set forth above, under the Ethics Reform Act, the future owner of the right to the pay adjustment is clear and the self-executing, non-discretionary structure of the Ethics Act makes the transfer of property sufficiently certain to vest. At a minimum, this Court should decide what vesting rules arise out of the Compensation Clause and whether the Federal Circuit correctly interpreted *Will* as severely limiting the protection of judicial independence embodied in Article III.

3. Finally, it is noteworthy that state courts interpreting state constitutions have concluded that the failure to provide judicial officers with promised statutory cost-of-living adjustments unconstitutionally diminishes their compensation.

In *Jorgensen* v. *Blagojevich*, 811 N.E.2d 652 (Ill. 2004), the Supreme Court of Illinois held that a statute and a subsequent gubernatorial "reduction veto" denying judges a cost of living increase violated the state constitutional provision barring reduction of a judge's salary during his or her term of office. The

court rejected the argument based on *Will* that the reductions were constitutional because "the COLAs in question had not yet taken effect," *id.* at 664. The court explained that the judicial COLAs were formulated to ensure that they would be "considered a component of salary fully vested at the time the Compensation Review Board's report became law." *Id.* An analogous congressional purpose animated the Ethics Reform Act.

Similarly, in *Olson* v. *Cory*, 636 P.2d 532 (Cal. 1980), the Supreme Court of California construed a provision of the California Constitution, art. III, § 4, providing that the "[s]alaries of elected state officers may not be reduced during their term of office." 636 P.2d at 539, 535 n.2 (internal quotations omitted). It held that annual cost of living adjustments to those salaries, including judicial salaries, could not be limited without violating the Constitution. The court explained that "[s]ecurity of both tenure and subsistence are important factors in creating and maintaining an independent judiciary." *Id.*[4]

To be sure, these state court decisions do not create the kind of decisional conflict among the lower courts that generally animates a grant of certiorari, but they cast doubt on the Federal Circuit's holding. They also provide the diversity of views that ensures that this Court will have the benefit of varying perspectives on the issue presented. Given the importance of judicial

---

[4] *See also Stiftel* v. *Malarkey*, 384 A.2d 9 (Del. 1977) (elimination of the promised cost of living adjustment violated the state's compensation clause). This case was later overruled by constitutional amendment which provided that "'increases in salary or emoluments scheduled by statute for a future date and not yet received by the officer'" may be eliminated by the legislature. *Lee* v. *State Bd. Of Pension Trs.*, 739 A.2d 336, 344 (Del. 1999) (per curiam).

independence to the quality of justice and the core values of separation of powers at the root of our Constitution, serious doubt provides more than enough reason for this Court to intervene now.

* * * *

Williams's interpretation of the Ethics Reform Act and the Compensation Clause is wrong. Yet, it is the law of the land unless this Court grants the petition to "preserv[e] unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration." *O'Donoghue*, 289 U.S. at 533.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

SCOTT M. MCCALEB
1620 I Street N.W.
Suite 900
Washington, D.C. 20006
(202) 558-2421
Counsel for FCBA

CARTER G. PHILLIPS
VIRGINIA A. SEITZ*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
vseitz@sidley.com
Counsel for Amici Curiae

LAWRENCE M. FRIEDMAN
BARNES, RICHARDSON &COLBURN
303 East Wacker Drive
Suite 1020
Chicago, IL 60601
(312) 297-9554
Counsel for CITBA

ALAN KASPER
241 18th Street
Suite 700
Arlington, VA 22202
(703) 415-0780
Counsel for AIPLA

DOUGLAS K. NORMAN
1501 M Street, N.W.
Suite 1150
Washington, D.C. 20005
(202) 507-4500
Counsel for IPO

ERIN M. DUNSTON, ESQ.
1016 16th Street, N.W.,
Suite 101
Washington, D.C. 20036
(202) 223-6600
Counsel for the BADC

LAWRENCE R. BACA
1220 N. Fillmore
Suite 444
Arlington, VA 22201
(571) 481-9100
Counsel for FBA

June 14, 2010

* Counsel of Record

APPENDIX

APPENDIX

The Federal Circuit Bar Association ("FCBA") is a national organization for the Bar of the Court of Appeals for the Federal Circuit. It unites the different groups across the Nation which practice before that court, seeking to strengthen and serve the court. FCBA members who are government attorneys played no role in the decision to file this brief or in developing the content of this brief.

The American Intellectual Property Law Association ("AIPLA") is a national bar association of more than 16,000 members engaged in private practice and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly and indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. AIPLA members represent both owners and users of intellectual property and embody a broad cross-section of the intellectual property community.

The Customs and International Trade Bar Association ("CITBA") is an association of lawyers whose practices primarily involve the regulation of international trade and the judicial review of related agency decisions. CITBA, known as the Association of the Customs Bar until 1981, was founded in 1917 and currently has over 400 members throughout the United States and in other countries. CITBA's mission includes seeking improvements in the legal system and facilitating the administration of justice under the customs and international trade laws. CITBA, therefore, has a direct interest in matters affecting the structure and quality of the federal bench and, in particular, the Court of Appeals for the

Federal Circuit where appeals relating to customs and trade regulation are heard. Its members who are government attorneys played no role in the decision to file this brief or in developing the content of this brief.

The Bar Association of the District of Columbia – Patent, Trademark & Copyright Section ("BADC") – is one of the senior intellectual property bar associations in the United States. The BADC is uniquely situated in the nation's capital, having a broad cross-section of members from government, industry, and private practice. BADC members often represent the interests of patent applicants, patentees, and those seeking to avoid patents. The BADC seeks to advance and create a uniform body of predictable case law to guide the patent community. Thus, issues pertaining to the structure and quality of the federal bench, including the Court of Appeals for the Federal Circuit, are especially important to the BADC. BADC members who are government attorneys neither developed the content of this brief nor played any role in the decision to file this brief.

The Intellectual Property Owners Association ("IPO") is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in U.S. intellectual property rights. IPO's membership includes more than 200 companies and more than 11,000 individuals involved in the association through their company, law firm or as individuals. IPO represents the interests of all owners of intellectual property.

The Federal Bar Association ("FBA") is the foremost national association of public and private lawyers engaged in the practice of law before the federal courts and federal agencies. Its work on

issues affecting the federal judiciary and the federal practitioner are well documented. Its members who are government attorneys played no role in the decision to file this brief or in developing the content of this brief.