

Court of Appeals
STATE OF NEW YORK

HON. SUSAN LARABEE, HON. MICHAEL NENNO, HON. PATRICIA NUNEZ,
AND HON. GEOFFREY WRIGHT,

Plaintiffs-Respondents-Appellants,

-against-

THE GOVERNOR OF THE STATE OF NEW YORK

Defendant-Respondent,

NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY, AND THE STATE OF
NEW YORK,

Defendants-Appellants-Respondents.

**BRIEF OF PROPOSED AMICUS CURIAE THE ASIAN AMERICAN BAR
ASSOCIATION OF NEW YORK, THE BRONX BAR ASSOCIATION, THE
DOMINICAN BAR ASSOCIATION, THE LATINO LAWYERS OF QUEENS, THE
LESBIAN, GAY, BISEXUAL, AND TRANSGENDER LAW ASSOCIATION OF
GREATER NEW YORK, INC., THE METROPOLITAN BLACK BAR ASSOCIATION
OF NEW YORK, THE MUSLIM BAR ASSOCIATION OF NEW YORK, AND THE
PUERTO RICAN BAR ASSOCIATION OF NEW YORK**

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Proposed amicus curiae the Asian American Bar Association of New York, the Bronx Bar Association, the Dominican Bar Association, the Latino Lawyers of Queens, the Lesbian, Gay, Bisexual, and Transgender Law Association of Greater New York, Inc., the Metropolitan Black Bar Association of New York, the Muslim Bar Association of New York, and the Puerto Rican Bar Association of New York (“Proposed Amicus Curiae”) respectfully submit this brief in support of the position of Plaintiffs-Respondents-Cross Appellants, Honorable Susan Larabee, Honorable Michael Nenno, Honorable Patricia Nunez, and Honorable Geoffrey Wright (the “Plaintiffs”). Proposed Amicus Curiae write in support of the unanimous decision and order of the Appellate Division, First Department entered June 2, 2009 (Luis A. Gonzalez, P.J., Peter Tom, Eugene Nardelli, Karla Moskowitz, Diane T. Renwick, JJ.) (the “Appellate Division Ruling”) (CA6-CA54), as affirmed the order of the Supreme Court, New York County (Edward H. Lerner), entered, June 11, 2008 (“June Order”), as granted Plaintiffs’ motion for summary judgment on the second cause of action in Plaintiffs’ Verified Complaint, which alleges that the Defendants, Governor of the State of New York, New York Senate, New York State Assembly and the State of New York (“Defendants”) have violated the doctrine of separation of powers. Proposed Amicus Curiae endorse the positions in the brief of proposed amicus curiae the New York County Lawyers Association and submit the following additional positions.

INTEREST OF AMICUS CURIAE

The Proposed Amicus Curiae are minority bar associations or general purpose bar associations which represent substantial numbers of attorneys who are members of minority groups. Collectively, the Proposed Amicus Curiae represent the interests of thousands of judges and law students. Each of the Proposed Amicus Curiae takes positions on issues of interest to their constituencies and to the legal community in general. Each of the Proposed Amicus Curiae has previously taken advocacy positions, sometimes in the form of amicus curiae briefs, in cases that raise significant issues for that bar association and/or issues that concern the independence of the judiciary. For example, the Asian American Bar Association of New York and the Metropolitan Black Bar Association of New York submitted amicus curiae briefs in *New York State Board of Elections v. Lopez Torres*, 128 S. Ct. 791 (2008), a case involving the constitutionality of New York's system for the selection of Supreme Court justices.

Each of the Proposed Amicus Curiae shares an interest in strengthening and maintaining the independence of New York State's judiciary. Each shares a concern that a failure to provide adequate compensation for judges violates

principles of Separation of Powers and discourages qualified individuals from seeking the state court bench.¹

The Proposed Amicus Curiae hereby submit this amicus brief to urge this Court to affirm the ruling of the Appellate Division, First Department that Defendants' continuing failure to properly address judicial compensation violates the New York Constitution and must be remedied.

PRELIMINARY STATEMENT

Proposed Amicus Curiae are concerned about the crisis in judicial compensation and the resulting corrosive impact on the administration of justice.

As core principles of economics would dictate, devoting fewer resources to judicial compensation decreases the quality of candidates --including minority candidates -- who opt for a judicial career and correspondingly reduces the quality of justice administered by our courts. And requiring our judges to go hat-in-hand to the legislature for judicial salary increases degrades our judges and impairs their independence. This is particularly true when the legislative response invariably is to hold judicial salaries hostage to legislative salaries -- in violation of separation of powers principles. As the First Department correctly held:

¹ Officials of some of the Proposed Amicus Curiae have written editorials and made public speeches in support of the goal that New York's judiciary be accorded fair compensation. *See, e.g.,* Asian Am. Bar Association of New York Statement, Asian Bar Supports Judicial Pay Suit," *New York Law Journal*, April 17, 2008; Vincent T. Chang, "Asian Bar Cares About Judicial Pay," *New York Law Journal*, April 18, 2007. (Both are available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=900005477716>).

“[T]he political maneuvering by the other branches of government, by reducing the issue of judicial compensation to a tactical weapon, consequently subordinated the status of the Judiciary to that of an inferior governmental entity. . . These acts and their ramifications necessarily undermine the carefully constructed architecture of New York government.”

Larabee v. Governor, 65 A.D.3d 74, 97, 880 N.Y.S.2d 256, 274 (1st Dep’t 2009).

Tellingly, the Petitioners do not meaningfully dispute the need for fair judicial compensation. R. 318-19. Rather, their principal response to the well-reasoned decision of the First Department is to contend that the other two branches of government – and those two branches alone – have the authority to dictate judicial salaries. But this facile point is defeated by Petitioners’ admission below that at some point declining judicial salaries unconstitutionally impair judicial independence. R. 323-25. The Proposed Amicus Curiae submit that the State of New York has passed that point. That we face a true crisis in judicial compensation is demonstrated by the fact that New York’s real judicial salaries have sunk below the levels of every other state in the nation -- including states with far less wealth. R. 160. And as their pay has eroded, the workload of our judges has soared. This Court must intervene to address this crisis, which grows worse each year.

BACKGROUND

The statistics defy belief and only grow even more dire as each year passes with no increase in judicial salaries, resulting in a corresponding diminution in judicial purchasing power.

- Some New York state judges make as little as \$108,000 per year.

National Center for State Courts, *Judicial Compensation in New York: A National Perspective* at 5 (May 2007). Even some senior law clerks in New York State can earn more than this \$108,000 figure. Starting associates in large law firms can make 50% more than this figure. *Id.* at 12.

- New York state judges have not had a raise (or any salary adjustment such as a cost of living increase) in over ten years despite a more than 30% increase in the cost of living. *Larabee*, 65 A.D.3d at 85.
- No other group of judges in the United States has gone longer without a pay raise. National Center for State Courts, *supra*, at 9. In fact, it is hard to think of any group of workers in the entire economy that has suffered for so long with no increase in compensation.
- Since 1978, New York state judicial salaries have declined 40% in real terms. During that same time span, the average judges' case load has increased dramatically. *Id.*

- When adjusted for the cost of living, New York state judges, by some measures are among *the worst paid judges in the entire country*.

National Center for State Courts, *supra*, at 9.

Proposed Amicus Curiae submit that this judicial compensation crisis has had a profound effect on the administration of justice and a disproportionate effect upon minority groups. Accordingly, for the reasons stated in the amicus brief of the New York County Lawyers Association and those stated below, we respectfully ask this Court to affirm the decisions of the First Department and the Supreme Court below.

I. Inadequate Judicial Compensation Disproportionately Reduces the Pool of Minority Group Members Who are Willing and Able to Serve as Judges

Proposed Amicus Curiae, like other bar associations, are deeply concerned about the detrimental effect on the quality of the candidates for judicial office if judicial salaries are not maintained at a fair level. Inadequate judicial compensation adversely affects the recruitment of talented lawyers to the judiciary -- and minority group members are often among the most affected.

Evidence is mounting that the lack of an increase in judicial compensation is causing hardship among our judges. For example, prior to 2005, it was rare for judges to borrow against their state pensions. However, between 2005 and 2007 alone, the number of judges engaging in such borrowing more than quadrupled to

an astounding 10% of the entire judiciary. Atlantic Legal Foundation, Report, *Adequate Compensation for Judges is Essential for New York's Business and Economy* (Oct. 2008) (www.atlanticlegal.org).² As former Chief Justice Judith Kaye has noted, “[e]xperienced judges increasingly talk of resigning so they can afford to live in New York and educate their children.” Judith S. Kaye, *Free judges Pay*, N.Y. Times, June 7, 2007.

Of course, those who are considering careers in the judiciary are well aware of the hardships endured by our judiciary and, as Judith Kaye correctly put it, judicial compensation has reached such a “level of unfairness and disdain [that] our Judiciary cannot attract and retain the very best lawyers at the pinnacle of their careers.” It is to avoid such a consequence that both the United States and New York constitutions protect judicial compensation “to induce learned men and women to ‘quit the lucrative pursuits’ of the private sector.” *United States v. Hatter*, 532 U.S. 557, 568 (2001).

In recognition of the wisdom of these words, several minority bar association have over the years passed resolutions supporting higher judicial pay at the state and federal level because these bar associations are concerned that low levels of judicial pay will further erode the number of minority judges. Attorneys from minority groups typically come from less wealthy families and thus qualified

² This 2007 number is undoubtedly much higher today.

minority group candidates often cannot make the financial sacrifice necessary to become a judge. Indeed, Judge J. Brock Hornby of the U.S. District Court for the District of Maine wrote in 2007 that:

The salary discrepancy may also impair the judiciary's racial, ethnic and gender diversity as qualified candidates not to forego highly lucrative alternatives. For example, anecdotal evidence from Asian American lawyers suggests that some of their colleagues have turned down federal judgeships because of the salary (the nature of the appointment process makes it impossible to gather statistics), and some African American judges have left the bench for other, more financially rewarding opportunities.

J. Brock Hornby, *The Metropolitan Corporate Counsel* at 8 (Sept. 2007).

Thus, the largest national bar association for African Americans, the National Bar Association, through its Judicial Council, recently enacted a resolution that made the observation that:

African American lawyers who have a successful private practice or who are the general counsel or in other high-paid sectors can ill-afford to make the personal financial sacrifice of opting for a judicial appointment where the salary is only \$165,000 annually [for federal judges], which is below that of some first-year law associates right out of law school;

WHEREAS, attracting and retaining first-rate African American legal talent is a concern and more than a few experienced and well-regarded African America jurists have resigned from the federal bench to take higher paying positions, pointing to a dangerous trend of diminishing numbers of African American jurists on our federal benches at a time when we need more, not fewer, African American judges.

National Bar Assoc. Judicial Council, *Resolution in Support of Federal Judicial Salary Restoration Action of 2007*.

(<http://www.uscourts.gov/judicialcompensation/nba.pdf>)

The Asian American Justice Center, writing on behalf of a number of organizations, urged the House Judiciary Committee to enact fair judicial compensation, noting that:

Judicial compensation is a significant barrier to the recruitment of African American, Asian American, Latino, and Native American candidates . . . in our discussions with minority members of the Bar, the issues of compensation is cited as a significant reason in their decision not to seek a federal bench appointment. Most recently, an Asian American litigation department chair in one of the nation's most prominent law firms carefully considered applying to the bench but declined because of the pay disparity . . . It is imperative that our federal judiciary be able to recruit a diverse pool of the best and brightest and not be hindered by the current level of judicial compensation.

Asian Am. Justice Center Letter to the Chairman of the House Jud. Comm., Apr. 19, 2007 (<http://www.judgingtheenvironment.org/assets/pdf/Minority-Bars-Letter-Berman.pdf>).

Accordingly, Proposed Amicus Curiae urge affirmance of the decisions below.

II. Threats to Judicial Independence Disproportionately Affect Minority Group Members

As this Court has long noted, “[t]he safety of free government rests upon the independence of each branch and the even balance of power between the three.” *People ex rel. Burby v. Howland*, 155 N.Y. 270, 282 (1898); *Under 21, Catholic Home Bureau for Dependent Children v. New York*, 65 N.Y.2d 344, 356 (1985); *see Larabee*, 65 A.D.3d at 93.

Unless steps are taken to provide judges with reasonable financial security, the very judicial independence that is the foundation of our rule of law – and the protection of minorities -- is at risk. Fair judicial compensation is designed “to benefit not the judges as individuals, but the public interest in a competent and independent judiciary.” *United States v. Will*, 449 U.S. 200, 217 (1980). In the *Federalist Papers*, Hamilton explained the importance of fair compensation: “[I]n the general course of human nature, a power over a man’s subsistence amounts to a power over his will.” *Federalist Papers* No. 79.

It is beyond cavil that the practice of holding judicial salaries hostage to the political will of the Legislature impairs judicial independence. *Larabee*, 65 A.D.3d at 77-79; *id.* at 84 (“[t]his outcome necessarily denigrated the third branch of government and subordinated it to the competing political strategies of the other branches of government. That dynamic impinged upon the independence of the

Judiciary as a discrete branch of New York government”). As Chief Justice

Roberts wrote in his 2006 Year End Report on the Federal Judiciary:

Inadequate compensation directly threatens the viability of life tenure, and if 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. And as Alexander Hamilton explained “[t]he independence of the judges, once destroyed, the constitution is gone, it is a dead letter, it is a vapor which the breath of faction in a moment may dissipate.”

Justice John Roberts, 2006 Year End Report on the Federal Judiciary

(quoting *Commercial Advertiser* (Feb. 26, 1802) (reprinted in the *Papers of Alexander Hamilton*, Volume XXV 525 (Columbia Univ. Press 1977)).

The First Department’s opinion upholding judicial independence through its enforcement of principles of separation of powers is of special importance to minorities, for the doctrine of separation of powers specifically aims to prevent a tyranny of the majority. The separation of powers was designed to support “the [F]ramers’ antipathy to the exercise of arbitrary power” and “to prevent the mischief of factions and the tyranny of passionate majorities or ambitious politicians.” Wright, *The Modern Separation of Powers: of Powers: Would James Madison Have Untied Ulysses?*, 18 *Cumberland L. Rev.* 69, 72 (1987); see *Loving v. United States*, 517 U.S. 748, 756 (1996) (“Even before the birth of this country, separation of powers was known to be a defense against tyranny.”) (citing Baron de Montesquieu, *The Spirit of the Laws* 151-152 (T. Nugent transl. 1949)).

The foregoing principles are not mere abstractions to minorities. Rather, from the very beginning of our Republic, the Founders recognized that the dissipation of judicial independence would have the most profound effect on minorities. As Judge J. Clifford Wallace wrote, the founders recognized:

the protections of an independent judiciary to be critical to protect the rights of minorities, stating that “independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves.”

Judges’ Forum No. 2, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. Ann. Surv. Am. L., 241, 255 (quoting *The Federalist* No. 78 (231)).

As another commentator put it, “[m]inority rights are always at risk in a majority-driven world; an independent judiciary is a crucial part of a structure that protects, on a basis of equality, the rights of those who lack power in majoritarian politics.” Martha C. Nussbaum, *The Supreme Court: 2006 Term: Foreword Constitutions and Capabilities: “Perception” Against Lofty Formalism* 121 Harv. L. Rev. 4.

In New York State, inadequate judicial compensation strikes particularly hard at minority groups. Here, the state judiciary plays a unique role in dispute resolution in minority and low income communities. For example, New York City’s Civil Court -- a court known as the “People’s Court” because of its coverage

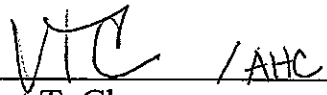
of housing disputes, small claims, foreclosures, credit disputes, and other cases under \$25,000 – hears nearly *one million cases* annually – nearly the same number of cases that the *entire federal judicial system* hears. And as its dockets continue to burgeon, the salaries of its overburdened judges remain constant. This divergence of diminishing real salaries and skyrocketing caseloads cannot persist indefinitely. Unless action is taken to remedy the judicial compensation crisis, the administration of justice – particularly to minority groups in New York – will suffer grave (and potentially irremediable) consequences.

CONCLUSION

For the foregoing reasons, Proposed Amicus Curiae the Asian American Bar Association of New York, the Bronx Bar Association, the Dominican Bar Association, the Latino Lawyers of Queens, the Lesbian, Gay, Bisexual, and Transgender Law Association of Greater New York, Inc., the Metropolitan Black Bar Association of New York, the Muslim Bar Association of New York, and the Puerto Rican Bar Association of New York urge affirmance of the decisions below.

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Respectfully submitted,



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