No. 09-1395

In the Supreme Court of the United States

PETER H. BEER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Ethics Reform Act of 1989 (1989 Act), Pub. L. No. 101-194, 103 Stat. 1716, established a formula for making annual increases to the salaries of federal judges and other high-level government officials based on increases in private-sector salaries. The 1989 Act provided that such an increase would be made on January 1 of any year in which the salaries of General Schedule federal employees were also increased. In 1995, 1996, 1997, and 1999, the salaries of General Schedule employees were increased, but Congress passed a law, before January 1 of each year, disallowing salary increases for judges and other high-level officials. In *Williams* v. *United States*, 240 F.3d 1019 (2001), cert. denied, 535 U.S. 911 (2002), the Court of Appeals for the Federal Circuit rejected the claims of a class of judges, including the eight petitioners in this case, who contended that Congress's disallowance of salary increases contemplated by the 1989 Act violated the Compensation Clause of Article III of the Constitution. In 2009, petitioners brought this suit raising substantively identical Compensation Clause claims. Based on *Williams*, the Court of Federal Claims dismissed the complaint, and the Federal Circuit summarily affirmed.

The questions presented are as follows:

1. Whether principles of issue preclusion bar petitioners from relitigating the Compensation Clause issue that was decided against them in *Williams*.

2. Whether the Compensation Clause prohibits Congress from disallowing salary increases contemplated by the 1989 Act, where the statutes disallowing those increases were enacted into law before the increases were scheduled to take effect.

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OPINIONS BELOW

The order of the court of appeals summarily affirming the dismissal of petitioners' complaint (Pet. App. 1a-5a) is unreported. The order of the court of appeals (Pet. App. 6a-16a) denying the petition for initial hearing en banc is reported at 592 F.3d 1326. The order of the Court of Federal Claims (Pet. App. 17a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2010. A petition for initial hearing en banc was denied on January 15, 2010 (Pet. App. 6a-16a). On March 23, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 14, 2010, and the petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The salaries of federal judges are determined according to "an interlocking network of statutes." *United States* v. *Will*, 449 U.S. 200, 202 (1980). Both before and after *Will*, annual increases in judicial salaries have been linked to increases in the salaries of Members of Congress and high-level Executive Branch officials, and those increases have been contingent upon increases to the salaries of General Schedule federal employees.

As this Court explained in *Will*, 449 U.S. at 203-204, base salaries for federal judges and other high-level federal officials were established by the Postal Revenue and Federal Salary Act of 1967 (Salary Act), Pub. L. No. 90-206, § 225, 81 Stat. 642. In the Executive Salary Cost-of-Living Adjustment Act (Adjustment Act), Pub. L. No. 94-82, § 201, 89 Stat. 419, Congress enacted a formula for making annual increases to those salaries. The Adjustment Act provided for increases in years in which similar adjustments were made in the General Schedule pay rates for other federal employees pursuant to the Federal Pay Comparability Act of 1970 (Comparability Act), Pub. L. No. 91-656, § 3, 84 Stat. 1946 (5 U.S.C. 5301 *et seq.*).

Under the Comparability Act in its original form, a presidential agent made annual recommendations for increases in federal salaries under the General Schedule to bring those salaries in line with those prevailing in the private sector. 5 U.S.C. 5301-5306 (1976 & Supp. V 1981). Each year, the agent compared General Schedule salaries to data on private-sector salaries compiled by the Bureau of Labor Statistics and recommended an

appropriate increase. *Will*, 449 U.S. at 204. That recommendation was reviewed by the Advisory Committee on Federal Pay, which made its own recommendation. *Ibid.* The President was then required either to adjust General Schedule salaries in accordance with the recommendations, or, if he believed that "economic conditions or conditions of national emergency ma[d]e the planned adjustment inappropriate," to submit to Congress an alternative plan, which would govern absent congressional intervention. *Ibid.* In either event, any salary increases would take effect on October 1, the beginning of the federal fiscal year. *Ibid.* The Adjustment Act provided that the salary increases made under the Comparability Act would also apply to the salaries of federal judges and other high-level officials and their salary increases would also take effect on October 1. *Id.* at 204-205.

b. For each of four fiscal years beginning in the late 1970s, Congress enacted legislation disallowing the judicial salary increase that was scheduled to take effect pursuant to the Adjustment Act. See *Will*, 449 U.S. at 205-209. For two of the years (the fiscal years beginning on October 1, 1976, and October 1, 1979), the blocking legislation was signed into law after the beginning of the October 1 effective date of the scheduled salary increases. See *id.* at 205, 208. For the other two years (the fiscal years beginning on October 1, 1977, and October 1, 1978), Congress enacted, and the President signed, the blocking legislation before the October 1 effective date. See *id.* at 206-207. The plaintiffs in *Will* contended that all four disallowance statutes violated the Compensation Clause of Article III, Section 1, of the Constitution, which provides that Article III judges "shall, at stated Times, receive for their Services a Compensation, which

shall not be diminished during their Continuance in Office."

The Court in *Will* struck down the blocking legislation for the fiscal years beginning on October 1, 1976, and October 1, 1979. With respect to the first of those years, the Court explained that, by the time the blocking statute was signed into law by the President "during the business day of October 1, 1976, * * * the 4.8% increase under the Adjustment Act had already taken effect, since it was operative with the start of the month—and the new fiscal year—at the beginning of the day." 449 U.S. at 224-225. The Court concluded that the blocking statute violated the Compensation Clause because it "purported to repeal a salary increase already in force. Thus it 'diminished' the compensation of federal judges." *Id.* at 225; see *id.* at 226. The Court also invalidated the blocking statute for the fiscal year beginning October 1, 1979, which was likewise signed into law after the Adjustment Act salary increase for that year had taken effect. *Id.* at 229-230.

With respect to the fiscal years beginning on October 1, 1977, and October 1, 1978, however, the Court in *Will* rejected the plaintiffs' Compensation Clause claims. See 449 U.S. at 226-229. The Court explained that, for those years, the blocking statutes had been "passed before the Adjustment Act increases had taken effect—before they had become a part of the compensation due Article III judges. Thus, the departure from the Adjustment Act policy in no sense diminished the compensation Article III judges were receiving; it refused only to apply a previously enacted formula." *Id.* at 228 (footnote omitted). The Court rejected the argument that, "by including an annual cost-of-living adjustment in the statutory definitions of the salaries of Article III judges, * * * Con-

gress made the annual adjustment, from that moment on, a part of judges' compensation for constitutional purposes." *Id.* at 226-227 (citation omitted). Instead, the Court held, "Congress may, before the effective date of a salary increase, rescind such increase scheduled to take effect at a later date." *Id.* at 226.

c. After the decision in *Will*, Congress acted to ensure that judges' salaries would not increase without affirmative congressional authorization. It did so by enacting Section 140 of Public Law No. 97-92, 95 Stat. 1200 (a joint resolution providing appropriations for the operations of the federal government for fiscal year 1981). As originally enacted, Section 140 provided in relevant part:

> 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.

Ibid.

d. Several years later, Congress enacted the Ethics Reform Act of 1989 (1989 Act), Pub. L. No. 101-194, 103 Stat. 1716. The 1989 Act changed the formula for calculating annual increases to the salaries of federal judges and other high-level federal officials, providing that such increases would thereafter be calculated based on the percentage change in the Employment Cost Index (ECI), "a quarterly index of wages and salaries for private industry workers published by the Bureau of Labor Statistics," 135 Cong. Rec. 30,753 (1989), minus 0.5%.

1989 Act § 704(a)(2)(A), 103 Stat. 1769. The 1989 Act further provided that adjustments to judicial and other high-level salaries would take effect as of January 1 (rather than October 1 under the prior system). 28 U.S.C. 461(a).

The 1989 Act did not, however, disconnect increases to judicial salaries from increases to the salaries of other federal workers. As under the prior system, the 1989 Act authorized an annual adjustment to judges' salaries only if General Schedule federal employees also received a comparability adjustment for the same year. 1989 Act § 704(a)(2)(A), 103 Stat. 1769. Thus, if Congress enacted a law that prevented a comparability adjustment to the salaries of other federal employees for any particular year, or if the President determined that other federal employees should not receive an increase because of a "national emergency" or "serious economic conditions affecting the general welfare," 5 U.S.C. 5303(b)(1), federal judges also would not receive any adjustment for that year. Shortly after it enacted the 1989 Act, Congress determined that the ECI would also be used to calculate annual adjustments to the salaries of General Schedule employees and that adjustments to their salaries would take effect in the pay period beginning on or after January 1. Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509, § 529, 104 Stat. 1430 (enacting new 5 U.S.C. 5303).

In the decade following these legislative revisions, Congress permitted salary increases for federal judges and other high-level officials to take effect in some years, while disallowing such increases in other years. In particular, General Schedule rates of pay for 1995, 1996, 1997, and 1999 were increased under the Comparability Act. Before January 1 of each of those years, how-

ever, Congress enacted a law preventing any increase in the rates of pay for judges and other high-level federal officials. See Act of Sept. 30, 1994, Pub. L. No. 103-329, § 630, 108 Stat. 2424; Act of Nov. 19, 1995, Pub. L. No. 104-52, § 633, 109 Stat. 507; Act of Sept. 30, 1996, Pub. L. No. 104-208, § 637, 110 Stat. 3009-364; Act of Oct. 21, 1998, Pub. L. No. 105-277, § 621, 112 Stat. 2681-518.

e. In response to Congress's denials of salary increases contemplated by the 1989 Act, several federal judges brought a class action lawsuit on behalf of themselves and similarly situated Article III judges. See *Williams* v. *United States*, 48 F. Supp. 2d 52 (D.D.C. 1999), rev'd 240 F.3d 1019 (Fed. Cir. 2001), cert. denied, 535 U.S. 911 (2002). Those plaintiffs argued that congressional action to bar pay increases contemplated by the 1989 Act violated the Compensation Clause because the 1989 Act gave them a vested right to receive increases in any year in which General Schedule employees receive an increase. *Id.* at 53. The plaintiffs sought a variety of declaratory relief, including declarations that legislation withholding salary increases contemplated by the 1989 Act was "unconstitutional and void" under the Compensation Clause and that the plaintiffs were entitled to back pay. 1:97-cv-03106-JGP Docket entry No. 1, at 18 (D.D.C. Dec. 29, 1997).

The government argued in response that the 1989 Act did not give the judges a statutory right to automatic salary increases because Section 140 prohibited adjustments to judicial salaries without affirmative congressional legislation; and that, in any event, under this Court's decision in *Will*, the Compensation Clause does not prohibit Congress from disallowing a scheduled salary increase if the supervening law is enacted before the date on which the increase is scheduled to take effect.

Williams, 48 F. Supp. 2d at 59, 61. After certifying the case as a class action under Federal Rule of Civil Procedure 23(b)(2), Pet. App. 32a-34a, the district court rejected the government's arguments. The court held that the 1989 Act gave federal judges a vested right to annual salary increases and that the Compensation Clause prohibited Congress from withholding those increases in the 1990s, "as well as any future years." *Williams*, 48 F. Supp. 2d at 61.[1]

The United States Court of Appeals for the Federal Circuit reversed, with one judge dissenting. 240 F.3d 1019. The court of appeals agreed with the district court that Section 140 did not prevent the 1989 Act from giving judges a statutory right to future salary increases. The court of appeals concluded that Section 140 had expired at the end of the 1981 fiscal year and that, in any event, the 1989 Act qualified as an "Act of Congress hereafter enacted," which could provide for an increase in judicial salaries under the terms of Section 140. *Id.* at 1027 (quoting Section 140). The court held, however, that the Compensation Clause does not prevent Congress from withholding salary increases contemplated by the 1989 Act so long as legislation to disallow a particular increase is enacted into law before that increase is scheduled to take effect. *Id.* at 1027-1040.

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[1] The *Williams* litigation actually encompassed two suits, one addressing the disallowed salary increases for 1995 through 1997 and covering Article III judges who served between January 1, 1995, and December 31, 1997, see Pet. App. 34a, and the other addressing the disallowed salary increase for 1999 and covering judges who served between January 1, 1999, and the entry of judgment in the action, see 1:99-cv-01982-JGP Docket entry No. 11 (D.D.C. Sept. 24, 1999). On December 29, 1999, the district court entered judgment in the plaintiffs' favor in the second suit. *Id.* at No. 14.

The court of appeals observed that, in *Will*, this Court had "considered the Article III implications of negating a judicial pay-raise scheme strikingly similar to the one" at issue in *Williams*. 240 F.3d at 1027. The court of appeals explained that, under the pay scheme in *Will*, as under the 1989 Act, judges were entitled by statute to salary increases in any year in which General Schedule employees received an increase. *Id.* at 1027-1028. Nonetheless, the court noted, this Court held that legislation blocking a scheduled pay increase does not violate the Compensation Clause if the blocking legislation is enacted before the date on which the increase is "scheduled to become part of judges' compensation," because "a salary increase 'vests' for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges." *Id.* at 1029 (quoting *Will*, 449 U.S. at 229). The court of appeals thus understood *Will* to establish "a clear and simple rule for determining whether the repeal of a statutorily-mandated judicial pay increase runs afoul of Article III," a rule that "turns on the *timing* of the repeal action." *Ibid.* The court explained that "Congress retains authority to set the compensation of federal judges, even if the exercise of that authority involves the repeal of previously enacted laws that would produce compensation increases at specific future dates," so long as the supervening legislation is enacted into law before "the future pay increase" becomes "due and payable to federal judges." *Id.* at 1039.

The court of appeals in *Williams* twice denied rehearing en banc, with three judges dissenting from the second denial. 240 F.3d 1366 (2001); 264 F.3d 1089 (2001). This Court denied a petition for a writ of certio-

rari, with Justice Breyer, joined by Justices Scalia and Kennedy, dissenting. 535 U.S. 911 (2002).

f. After the Federal Circuit rendered its decision in *Williams*, Congress enacted new legislation to reinstate Section 140's bar on increases in judicial salaries without affirmative congressional action. Specifically, Congress amended Section 140 to provide that its limitations upon judicial salary increases "shall apply to fiscal year 1981 and each fiscal year thereafter." Act of Nov. 28, 2001, Pub. L. No. 107-77, § 625, 115 Stat. 803. As petitioners acknowledge, the 2001 legislation "automatically block[s] any future salary adjustments for federal judges unless specifically approved by Act of Congress." Pet. App. 25a.

For most years since 2001, however, Congress has specifically approved salary increases for federal judges. In particular, Congress enacted legislation specifically authorizing such increases for each of the years 2002-2006 and for 2008. See Pet. App. 25a. For 2007, however, Congress did not pass authorizing legislation. Pursuant to the 2001 legislation reinstating Section 140, judges therefore received no salary increase for that year. See *id.* at 26a.

2. Petitioners are current or former Article III judges, all of whom were members of the class certified by the district court in *Williams*. See Pet. App. 21a-23a, 34a. In 2009, petitioners brought this suit in the Court of Federal Claims (CFC), asserting the same legal theory —*i.e.*, that the Compensation Clause bars Congress from withholding the salary increases that federal judges were scheduled to receive under the 1989 Act—that the Federal Circuit had rejected in *Williams*. *Id.* at 20a-31a. In particular, petitioners alleged that the 1989 Act gave them

> a vested interest in the promised salary adjustments within the meaning of the Compensation Clause of Article III, and Congress thereafter violated that constitutional provision by enacting legislation denying [petitioners] those promised adjustments in 1995, 1996, 1997, and 1999 and then enacting legislation denying [petitioners] those promised adjustments in any future year (such as 2007) when those adjustments are not affirmatively approved by Congress.

Id. at 28a-29a. Petitioners sought declaratory relief, including a declaration that the Compensation Clause precludes Congress from withholding salary adjustments contemplated by the 1989 Act, and back pay. *Id.* at 30a.

The United States moved to dismiss the complaint on several grounds, including that petitioners' claims were barred by issue and claim preclusion. Def.'s Mot. to Dismiss 1-15. Petitioners acknowledged that the Federal Circuit's decision in *Williams* foreclosed their claim for relief and that the aim of their suit was "to overturn that precedent in either the Federal Circuit or the Supreme Court." Resp. to Mot. to Dismiss 1.

3. The CFC dismissed petitioners' complaint on the ground that petitioners' suit "cannot be distinguished from *Williams*." Pet. App. 18a. The court declined to address the alternative grounds for dismissal raised by the United States, reasoning that, because *Williams* "foreclose[d] [the] court's ability to grant plaintiffs the relief they seek," "[a] discussion of the court's views on alternative arguments would not be an effective use of judicial resources." *Ibid.* (internal quotation marks omitted). The court emphasized, however, that its decision not to address the alternative arguments "d[id] not imply a position on the merits." *Ibid.*

4. Petitioners appealed, seeking either initial hearing en banc or summary affirmance. Pet. for Initial Hr'g En Banc or, in the Alternative, Mot. for Summ. Affirm. 1-5. Petitioners again acknowledged that "this case is controlled by the *Williams* precedent, and that this litigation seeks to overturn that precedent." *Id.* at 3. The United States did not oppose summary affirmance but argued that the CFC's judgment could be affirmed on alternative grounds, including issue preclusion. Resp. to Mot. for Summ. Affirm. 2.

The court of appeals granted the motion for summary affirmance. Pet. App. 1a-5a. The court noted that "the parties agree, and we must also agree, that *Williams* controls the disposition of this matter." *Id.* at 4a. The court did not address the alternative grounds for affirmance raised by the United States. The court simultaneously denied the petition for initial rehearing en banc, with four judges dissenting. *Id.* at 6a-16a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Because principles of issue preclusion independently require dismissal of petitioners' complaint, this case does not present an appropriate occasion for the Court to reconsider the correctness of the constitutional ruling in *Williams* v. *United States*, 240 F.3d 1019 (Fed. Cir. 2001), cert. denied, 535 U.S. 911 (2002). In any event, this Court's decision in *United States* v. *Will*, 449 U.S. 200 (1980), makes clear that the Compensation Clause does not prohibit Congress from withholding an annual adjustment to judicial salaries contemplated by the 1989 Act so long as the supervening legislation is enacted into law before a scheduled adjust-

ment takes effect. That holding is no more worthy of this Court's review now than it was when the Court denied review in *Williams*. On the contrary, the issue is now of diminishing importance: In 2001, Congress blocked any future salary adjustments for federal judges without specific congressional authorization, and judges who took office after that 2001 law was enacted have no plausible Compensation Clause claim based on the 1989 Act. Accordingly, the Court should deny the petition for a writ of certiorari.

1. a. Petitioners' current claims depend on an interpretation of the Compensation Clause that the Federal Circuit rejected in *Williams*. Because petitioners were members of the plaintiff class in *Williams*, they are bound by that decision. Accordingly, principles of issue preclusion bar petitioners from relitigating the Compensation Clause issue and thus provide an independent ground for dismissal of petitioners' complaint.

Under the doctrine of issue preclusion, a party bound by a prior judgment is barred from relitigating "'an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2171 (2008) (quoting *New Hampshire* v. *Maine*, 532 U.S. 742, 748-749 (2001)). Petitioners' claims in their current suit depend on the legal proposition that the Compensation Clause bars Congress from withholding the annual adjustments to judicial salaries contemplated by the 1989 Act. See Pet. App. 28a-29a, 30a. The plaintiff class in *Williams* advanced the same argument, and the Federal Circuit squarely rejected it, holding that the Compensation Clause does not bar Congress from disallowing a judicial salary increase contemplated by the 1989 Act so

long as the blocking statute is enacted into law before the salary increase takes effect. 240 F.3d at 1027-1040. That holding was essential to the Federal Circuit's judgment in *Williams*, since it formed the basis for the court's rejection of the Compensation Clause claims asserted by the plaintiff class. *Id*. at 1040.

A judgment in a class action binds unnamed class members so long as they were adequately represented by the named plaintiffs. *Taylor*, 128 S. Ct. at 2167, 2172; *Hansberry* v. *Lee*, 311 U.S. 32, 41 (1940). In certifying the class in *Williams*, the district court found that the named "plaintiffs, with their counsel, will fairly and adequately protect and represent the interests of the Class," and "that the interests of the representative parties are co-extensive with those of the Class." Pet. App. 33a. Petitioners do not dispute that the interests of the named plaintiffs in *Williams* were "aligned" with petitioners' interests or that the named plaintiffs "understood themselves to be acting in a representative capacity." *Taylor*, 128 S. Ct at 2174. Moreover, the plaintiffs were represented by able, professional counsel who vigorously pursued the claims of the plaintiff class for more than four years through every level in the federal system. Because petitioners were adequately represented by the named plaintiffs in *Williams*, they cannot now relitigate the Compensation Clause issue that was decided against them.

b. Petitioners contend (Pet. 25) that they are not bound by the judgment in *Williams* because that suit was predominantly for money damages and was therefore improperly certified under Federal Rule of Civil Procedure 23(b)(2). That argument is incorrect.

A class member cannot avoid the preclusive effect of a class action by arguing in a later suit that the class was

improperly certified. On the contrary, the issue whether the class was properly certified is itself res judicata in a subsequent action and cannot be relitigated. *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994). Any other rule would permit unnamed class members to withhold potential challenges to class certification until the case has been decided, accepting the benefit of the judgment if it is favorable but collaterally attacking the judgment if it is unfavorable. The very purpose of preclusion rules is to prevent that kind of gamesmanship.

In any event, the district court in *Williams* properly certified a class under Rule 23(b)(2). Although Rule 23(b)(2) does not explicitly exclude monetary claims, the Advisory Committee Notes indicate that the Rule "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23 advisory committee notes (1966 amendment). The courts of appeals have therefore generally held that money damages "may be obtained in a (b)(2) class action so long as the predominant relief sought is injunctive or declaratory." *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998).

The predominant relief sought in *Williams* was a declaratory judgment that would require salary adjustments in "any future years." 48 F. Supp. 2d at 61; see *Williams*, 240 F.3d at 1024-1025 (noting that the plaintiffs had requested "a declaration that the COLA provisions of the 1989 Act must be followed in future years," and that the district court had "ordered the government to award COLAs to federal judges in the future whenever COLAs are awarded to the General Schedule"). That declaratory relief was far more significant to the plaintiff class than their relatively modest claims for back pay, which under the Little Tucker Act, 28 U.S.C.

1346(a)(2), could not exceed $10,000. Moreover, courts of appeals have frequently certified Rule 23(b)(2) class actions in which plaintiffs seek back pay in addition to injunctive or declaratory relief. See, *e.g.*, *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571, 619 (9th Cir. 2010) (en banc) (noting "the consensus view" that a request for back pay "is fully consistent with the certification of a Rule 23(b)(2) class action"). Those courts have reasoned that back pay is equitable relief rather than money damages, *Allison*, 151 F.3d at 415, and that calculation of back pay does not generally present complicated factual or individualized issues, *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331-332 (4th Cir. 2006).[2]

c. Petitioners also contend (Pet. 25) that dismissal of their suit based on collateral estoppel would violate their rights under the Due Process Clause because petitioners allegedly received inadequate notice and opt-out rights in the *Williams* litigation. That contention too is incorrect.

Even assuming that the Due Process Clause limits the preclusive effect of *Williams* to persons who had notice of that action, but see *Taylor*, 128 S. Ct. at 2176 (notice not always required); *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364, 1374 (6th Cir. 1977) (notice not required in Rule 23(b)(2) suit seeking back pay), cert. denied, 436

[2] Petitioners' contention (Pet. 25) that declaratory or injunctive relief constitutes money damages whenever it "involve[s] the payment of money" is incorrect and inconsistent with this Court's cases. See, *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 894-901 (1988) (holding that a suit for declaratory and injunctive relief to enforce a statutory command to pay money both retrospectively and prospectively was not a suit for "money damages"); *Califano* v. *Yamasaki*, 442 U.S. 682, 700 (1979) (upholding class certification under Rule 23(b)(2) in a suit seeking an injunction against government efforts to recoup overpayments under the Social Security Act).

U.S. 946 (1978), petitioners do not contend that they lacked actual notice of the *Williams* litigation. Rather, petitioners appear to assert (Pet. 25) only that they were not notified *by the court* in *Williams* that the suit was pending. But the *Williams* litigation received significant press coverage, and notice of its filing as a class action on behalf of federal judges serving between 1994 and 1997 was published in the February 1998 edition of *The Third Branch*, the monthly newsletter of the federal judiciary distributed by the Administrative Office of the United States Courts. Experienced federal judges like petitioners were surely aware that class action litigation brought on their behalf "could affect their rights." Pet. 9. Petitioners do not identify any statute or rule that required a particular method or form of notice in *Williams*. And this Court has held that actual notice satisfies due process even when notice is not provided in the form or manner required by statute or rule. See *United Student Aid Funds, Inc.* v. *Espinosa*, 130 S. Ct. 1367, 1378 (2010).

Petitioners are similarly mistaken in contending (Pet. 25) that they cannot be bound by the *Williams* judgment because they received inadequate opt-out rights in that suit. At the time of the *Williams* litigation, applicable case law gave the district court discretion to grant opt-out rights in Rule 23(b)(2) class actions as necessary to "safeguard the due process rights of individual class members." *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997). Petitioners do not contend that they sought and were denied opt-out rights in *Williams*; nor did they argue in that litigation that the procedures adopted by the district court raised due process concerns. None of the decisions cited by petitioners (Pet. 25) holds that the Due Process Clause prevents a class-action judgment from binding an unnamed class member who received

actual notice of the action and its potential effect on his rights.[3]

The most natural inference from petitioners' behavior during the *Williams* litigation is that they chose to allow the class representatives to litigate the Compensation Clause issue on their behalf. Petitioners surely would have sought the benefits of the *Williams* decision if it had been favorable to the plaintiff class. They have identified no sound legal or equitable justification for allowing them to relitigate the dispositive Compensation Clause issue that the court of appeals in *Williams* resolved in the government's favor.

2. Even if petitioners were not bound by the judgment in *Williams*, this Court's review would not be warranted because petitioners' constitutional claims lack merit and are foreclosed by this Court's decision in *Will*.

a. In *Will*, this Court framed the question before it as "when, if ever, does the Compensation Clause prohibit the Congress from repealing salary increases that otherwise take effect automatically pursuant to a formula previously enacted?" 449 U.S. at 221. The Court stated that the case required it to "decide when a salary increase authorized by Congress 'vests'—*i.e.*, becomes irreversible under the Compensation Clause." *Ibid.* The Court answered that question by holding that a promised salary increase "vests," and "the protection of the Clause is first invoked," not "when the formula is *enacted*," *ibid.*, but

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[3] *Phillips Petroleum Co.* v. *Shutts*, 472 US. 797, 806-814 (1985), is particularly inapposite because the Court's decision in that case addressed a question not presented here—*i.e.*, whether and under what circumstances the Due Process Clause allows a state court to exercise personal jurisdiction over the claim of an out-of-state class-action plaintiff who lacks the minimum contacts with the forum that would support personal jurisdiction over a defendant.

"only when [the salary increase] takes effect as part of the compensation due and payable to Article III judges," *id*. at 229.

That rule follows from the text of the Compensation Clause, which provides that Article III 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 (emphasis added). A judge's compensation is not "diminished" unless it is reduced from the compensation that the judge previously "receive[d]." Thus, as this Court recognized in *Will*, even if one Act of Congress adopts a formula providing for judges to receive salary increases in the future, the passage of another Act of Congress to disallow those salary increases before they take effect does not "diminish[]" judges' compensation within the meaning of the Clause. See 449 U.S. at 228.

b. Petitioners seek to distinguish *Will* by contrasting the "self-executing and non-discretionary adjustment provisions of the 1989 Act" with the purportedly "imprecise and indefinite" adjustment provisions that the Court in *Will* considered. Pet. 22. Petitioners argue (*ibid.*) that "[t]he *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." That argument is flawed in at least two important respects.

i. Even if the Court in *Will could* have based its ruling on the "discretionary" character of the then-applicable statutory scheme, the Court did not decide the case on that ground. To the contrary, the Court described the scheduled salary adjustments as "tak[ing] effect automatically pursuant to a formula previously enacted." 449 U.S. at 221. In holding that Congress's disallowance of

the scheduled salary increases was valid for two of the fiscal years at issue, and invalid for the other two, the Court focused solely on the dates on which the four blocking statutes were enacted. See pp. 3-5, *supra*. And the Court squarely held "that a salary increase 'vests' for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges." 449 U.S. at 229. Nothing in *Will* suggests that a scheduled judicial salary increase can "vest" (*i.e.*, become constitutionally irrevocable) at some earlier date if the applicable statutory scheme is sufficiently "non-discretionary."

Adherence to the *Will* Court's actual *ratio decidendi* is essential not simply because of the decision's precedential status, but because the Court's reasoning informed both the subsequent decisions of Congress and the legitimate expectations of federal judges. Members of the Congress that enacted the 1989 Act could appropriately assume, based on the Court's analysis in *Will*, that judicial salary increases scheduled under the statute would remain subject to congressional disallowance or modification until those increases actually took effect. Adoption of petitioners' view of the Compensation Clause would give the 1989 Act a more far-reaching and irrevocable effect than the enacting Congress could reasonably have anticipated. By the same token, although petitioners contend that "the 1989 Act gave Article III judges every reason to expect that they would receive the future salary adjustments established by law" (Pet. 18), *Will* gave the same judges clear notice that they have no constitutional *entitlement* to any adjustment until that salary increase actually takes effect.

ii. Petitioners' contention (Pet. 21-22) that the salary adjustments in *Will* were "discretionary, not manda-

tory," while the adjustments contemplated under the 1989 Act are "self-executing and non-discretionary," ignores the fundamental similarities between the two statutory regimes. Under both schemes, federal judges are entitled to a salary increase in any year in which General Schedule salaries are increased, and the judicial salary increase takes effect automatically unless Congress intervenes. In addition, both schemes contemplate annual increases in General Schedule salaries to attain comparability with private-sector salaries. Under the scheme at issue in *Will*, the President was required to increase General Schedule salaries to promote comparability with private-sector salaries unless he "consider[ed] it inappropriate" "because of national emergency or economic conditions affecting the general welfare." 5 U.S.C. 5305(c)(2) (1976 & Supp. V 1981). Similarly under the current system, the President is required to increase General Schedule salaries unless he "consider[s] the pay adjustment * * * to be inappropriate" "because of national emergency or serious economic conditions affecting the general welfare." 5 U.S.C. 5303(b)(1).

Petitioners' contention (Pet. 21) that General Schedule salary increases are "non-discretionary" under the current system also ignores the continuing authority of Congress to enact legislation disallowing such increases. Although the President may disallow such increases only under limited circumstances, Congress may enact new legislation to prevent such increases from taking effect for any reason it deems sufficient. And because annual judicial salary increases take effect under the 1989 Act only if General Schedule salaries are adjusted, Congress's enactment of a law blocking General Schedule increases would have the practical effect of blocking judicial salary increases as well. The possibility that judicial

salary increases could be blocked in that (undoubtedly constitutional) manner further undermines petitioners' contention that the mere enactment of the 1989 Act gave them a constitutional entitlement to the annual adjustments at issue in this case.

c. Petitioners contend (Pet. 26) that the Federal Circuit's decisions in *Williams* and in this case place "the federal judiciary in precisely the mendicant position that the Compensation Clause abhors." They suggest (Pet. 16-18, 26) that a regime under which Congress decides on a year-by-year basis whether judicial salaries should be increased disserves the purposes of the Compensation Clause. That argument reflects a misunderstanding of the balance struck by the Framers.

As the Court in *Will* made clear, the Compensation Clause was not intended to insulate judicial salaries from all congressional control. Rather, the Compensation Clause

> embodies a clear rule prohibiting decreases but allowing increases, a practical balancing by the Framers of the need to increase compensation to meet economic changes, such as substantial inflation, against the need for judges to be free from undue congressional influence. The Constitution delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand.

Will, 449 U.S. at 227. Thus, while the Compensation Clause protects an Article III judge against *diminishment* of his salary during his tenure in office, congressional power to determine whether and when judicial sala-

ries should be *increased* is an integral feature of the constitutional design.

The Framers struck the balance described in *Will*, moreover, notwithstanding James Madison's stated concern that, if Congress were authorized to enact increases in judicial salaries, "judges might tend to defer unduly to the Congress when that body was considering pay increases." *Will*, 449 U.S. at 219. Madison proposed that Congress be barred from either increasing or decreasing judicial compensation, and that judges' salaries be tied instead to the value of wheat or some other commodity. *Id.* at 219-220. Gouverneur Morris opposed that proposal, and "[t]he Convention finally adopted Morris' motion to allow increases by the Congress." *Id.* at 220. As the Court in *Will* recognized, the Framers thus "accept-[ed] a limited risk of external influence in order to accommodate the need to raise judges' salaries when times changed." *Id.* at 220.[4]

3. This Court denied the petition for a writ of certiorari in *Williams*, which presented the same Compensation Clause issue that petitioners raise here. 535 U.S. 911 (2002). Petitioners identify no intervening legal developments that make that issue any more worthy of review now than it was when this Court denied the petition

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[4] The Court in *Will* further cautioned that an overbroad reading of the Compensation Clause would encroach on the constitutional prerogatives of the Legislative Branch. See 449 U.S. at 228 ("To say that the Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress."). In this regard, it bears emphasis that the Compensation Clause establishes a narrow exception to the general rule that Congress controls the expenditure of federal funds.

in *Williams*.[5] On the contrary, intervening developments have reduced the issue's ongoing importance.

In 2001, Congress enacted legislation reviving Section 140, a provision that prohibits the use of appropriated funds to increase judicial salaries "except as may be specifically authorized by Act of Congress hereafter enacted." Act of Dec. 15, 1981, Pub. L. No. 97-92, § 140, 95 Stat. 1200; see Act of Nov. 28. 2001, Pub. L. 107-77, § 625, 115 Stat. 803 (providing that the prohibition in Section 140 shall apply "to fiscal year 1981 and every fiscal year thereafter"); p. 10, *supra*. As petitioners' complaint acknowledges, the 2001 legislation "automatically block[s] any future salary adjustments for federal judges unless specifically approved by Act of Congress." Pet. App. 25a. The 2001 legislation thus effectively supersedes the regime established by the 1989 Act, under which annual judicial salary increases would take effect automatically absent contrary congressional action.[6]

Even assuming that "the 2001 legislation cannot affect the Compensation Clause claims of Article III judg-

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[5] Petitioners contend (Pet. 26) that the decline in the real value of judicial salaries has significantly worsened since the decision in *Williams*. That contention ignores the fact that Congress has expressly authorized judicial salary increases in seven of the nine years since the decision. In any event, as this Court explained in *Will*, the Framers made a considered decision that the Constitution would not establish a specific mechanism for protecting the real value of judicial salaries; instead, that task would be entrusted to Congress. 449 U.S. at 219-220; see pp. 22-23, *supra*.

[6] To the extent petitioners contend (Pet. 24) that the 1989 Act is an "Act of Congress hereafter enacted" within the meaning of Section 140 *as amended in 2001*, that argument is inconsistent with petitioners' complaint. See Pet. App. 25a-26a. The contention is also plainly incorrect because the 1989 Act was enacted *before* the 2001 legislation reinstated Section 140.

es (like petitioners) sitting prior to its enactment" (Pet. 23-24), the 2001 statute eliminates any substantial Compensation Clause issue with respect to judges who took office thereafter. No judge who took office after the 1989 Act was superseded by the 2001 law could plausibly claim a constitutional entitlement to yearly salary increases. The 2001 legislation therefore significantly diminishes the continuing importance of the question presented by the petition.

The limited ongoing importance of the question presented is even more apparent when one considers the 2001 legislation in conjunction with the preclusive effect of the *Williams* judgment. Because of the 2001 legislation, judges who took office after 2001 could not be affected by this Court's resolution of the Compensation Clause issue. And, given the preclusive effect of the *Williams* judgment, judges appointed before the end of the class certification period in *Williams* also could not be affected, because they are barred from relitigating the issue. See pp. 13-18, *supra*. Thus, the Compensation Clause question presented by the petition could affect only judges appointed between December 30, 1999, and November 28, 2001, the two-year interval between the end of the class certification period in *Williams* and the enactment of the 2001 law. For that reason as well, the question presented by the petition does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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