No. 01-175

In the Supreme Court of the United States

SPENCER WILLIAMS, 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

Under the Ethics Reform Act of 1989, Pub. L. No. 101-194, § 704(a)(2)(A), 103 Stat. 1769, the salaries of federal judges, Members of Congress, and high-level Executive Branch officials are adjusted based on the Employment Cost Index (ECI) calculated by the Bureau of Labor Statistics. The adjustment commences on January 1, for any year in which the General Schedule salaries of other federal employees are also adjusted based on the ECI. In Fiscal Years 1995, 1996, 1997, and 1999, the salaries of General Schedule employees were adjusted based on the ECI, but Congress passed a law, before January 1, that disallowed the adjustment to judicial, congressional, and executive salaries. Petitioners, a class of federal judges, contend that Congress's disallowance of those salary adjustments violated the Compensation Clause of Article III, Section 1.

The questions presented are:

1. Whether, as a matter of statutory interpretation, judges were not entitled to automatic adjustment of their salaries in those four years because Pubic Law No. 97-92, § 140, 95 Stat. 1200, separately prohibits any increase in judicial salaries, "except as may be specifically authorized by Act of Congress hereafter enacted."

2. Whether the laws disallowing salary increases in those four years violated the Compensation Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-99) is reported at 240 F.3d 1019. A separate opinion by the panel majority concurring in the full court's order denying hearing en banc (Pet. App. 163-164) is reported at 240 F.3d 1366. Separate opinions dissenting from the court's order denying hearing en banc (Pet. App. 151-162) are reported at 264 F.3d 1089. The initial decision of the district court granting summary judgment for petitioners (Pet. App. 103-131) is reported at 48 F. Supp. 2d 52. A subsequent decision of the district court granting judgment for petitioners in a related case (Pet. App. 144-148) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2001. A petition for rehearing was denied on April 30, 2001. Pet. App. 165-166. The petition for a writ of certiorari was filed on July 27, 2001. 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). While some aspects of that network of laws have been altered since this Court's decision in *Will*, the system has not changed in certain fundamental respects. In essence, Congress has established statutory salaries for federal judges, and has also provided a formula for potential salary adjustments in each calendar year to account for increases in the cost of living and to attain comparability with private-sector salaries. Both before and after *Will*, Congress has connected annual adjustments in judicial salaries to adjustments in salaries of Members of Congress and high-level Executive Branch officials, and has also made such adjustments dependent on adjustments to the General Schedule salaries of other federal employees.

As this Court explained in *Will* (449 U.S. at 203-204), base judicial salaries were established by the Postal Revenue and Federal Salary Act of 1967 (Salary Act), Pub. L. No. 90-206, § 225, 81 Stat. 642. In 1975, Congress also provided for annual adjustments in the salaries of high-level government officials, including judges, in the Executive Salary Cost-of-Living Adjustment Act (Adjustment Act), Pub. L. No. 94-82, § 201, 89 Stat. 419. The Adjustment Act originally connected adjustments in those salaries to the overall average

percentage annual adjustment of the General Schedule pay rates for other federal employees' salaries made pursuant to the Federal Pay Comparability Act of 1970 (Comparability Act), 5 U.S.C. 5301 *et seq.* See 28 U.S.C. 461(a) (1976 & Supp. V 1981); 5 U.S.C. 5305 (1976 & Supp. V 1981).

Under the Comparability Act as initially framed, a presidential agent made annual recommendations for adjustments to federal employees' salaries to bring those salaries in line with prevailing rates in the private sector. The agent annually compared the General Schedule rates with the rates of pay for the same levels of work in the private sector, and then made recommendations to the President for adjustment of federal salaries based on those comparisons. See 5 U.S.C. 5305 (1976 & Supp. V 1981); *Will*, 449 U.S. at 204. The President then submitted to Congress a report either adopting the agent's recommendation or making a different recommendation for adjustments in federal employees' pay for the following fiscal year (beginning October 1). The President's recommendation took effect on October 1 absent congressional intervention. *Ibid.* The Adjustment Act made those salary adjustments applicable as well to the salaries of federal judges, commencing also on October 1. *Id.* at 205; see Pet. App. 28-29.

b. In *Will*, this Court considered a challenge under the Compensation Clause of Article III, Section 1 of the Constitution to legislation that blocked adjustments to judicial salaries under the Adjustment Act in four fiscal years.[1] As to two of the years involved (referred to as

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[1] The Compensation Clause provides: "The Judges, both of the supreme and inferior Courts, * * * shall, at stated Times, receive

Years 2 and 3 in *Will*), Congress enacted and the President signed the blocking legislation before October 1, the initial date of the fiscal year on which the Adjustment Act increases were to take effect. In the other two years (referred to as Years 1 and 4), Congress enacted the blocking legislation after the Adjustment Act increases took effect on October 1.

This Court upheld the blocking legislation for Years 2 and 3, but struck down the legislation for Years 1 and 4, which had been enacted after the increases took effect. As pertinent here, the Court rejected the contention that the blocking legislation for Years 2 and 3 "'diminishe[d]' compensation within the meaning of the Compensation Clause," or "reduce[d] the amount a judge * * * has been promised," in violation of the Compensation Clause. *Will*, 449 U.S. at 227. Rather, the Court explained, the enactments for Years 2 and 3 were "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). Accordingly, the Court held that "Congress may, before the effective date of a salary increase, rescind such an increase scheduled to take effect at a later date." *Id.* at 226. The Court also rejected the district court's reasoning that, "by including an annual cost-of-living adjustment in the statutory definitions of the salaries of Article III judges, Congress made the annual adjustment, from that

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for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. Art. III, § 1.

moment on, a part of the judges' compensation for constitutional purposes." *Id.* at 226-227 (citation omitted).

c. In response to the Court's ruling in *Will* that invalidated the blocking legislation for Years 1 and 4, Congress acted to ensure that judges' salaries would not thereafter be increased without affirmative congressional action. It did so by enacting Section 140 of Public Law No. 97-92 (a joint resolution providing appropriations for the operations of the federal government). Section 140 provides 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.

95 Stat. 1200. The appropriations made under Public Law No. 97-92 originally were to expire on March 31, 1982, but were extended until September 30, 1982. See Pub. L. No. 97-92, § 102(c), 95 Stat. 1193; Pub. L. No. 97-161, 96 Stat. 22.

Although the appropriations made by Public Law No. 97-92 terminated upon that law's expiration, Congress has consistently acted on the understanding that Section 140's prohibition against adjustment of judicial salaries without specific authorization in a separate Act of Congress was permanent substantive legislation that survived the expiration of the provisions of the joint resolution that appropriated funds. Thus, in fiscal years in which federal judges received salary adjustments under the Salary Act and the Comparability Act, Congress has passed a law separately authorizing those ad-

justments, expressly providing that "[p]ursuant to section 140 of Public Law 97-92, Justices and judges of the United States are authorized * * * to receive a salary adjustment in accordance with 28 U.S.C. section 461." See Pet. App. 9.

d. The Ethics Reform Act of 1989 (Ethics Reform Act), Pub. L. No. 101-194, 103 Stat. 1716, comprehensively addressed the compensation of federal judges and Members of Congress. Congress generally barred judges and Members of Congress from receiving honoraria and limited their receipt of other outside income. See Pet. App. 169-170; Ethics Reform Act § 501, 103 Stat. 1760-1762; 5 U.S.C. App. §§ 501-502. Congress also provided for a one-time 25% increase in judges' salaries. See Pet. App. 3, 172; Ethics Reform Act § 703(a)(3), 103 Stat. 1768.

The Ethics Reform Act also reconfigured the mechanism for annual adjustments to judges' salaries under the Compensation Act and the Adjustment Act. Based on a recommendation of a bipartisan task force on ethics, see 135 Cong. Rec. 30,753 (1989), Congress provided that the salaries of federal judges, Members of Congress, and high-level Executive Branch officials would receive an annual adjustment equal to 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" (*ibid.*)—minus 0.5%. See Ethics Reform Act § 704(a)(2)(A), 103 Stat. 1769. The adjustment to judicial salaries takes effect as of January 1. See 28 U.S.C. 461(a) (adjustment to judges' salaries tied to pay period in which adjustments to General Schedule salaries take effect); 5 U.S.C. 5303(a) (General Schedule salary adjustments take effect for pay period beginning on or after January 1 of each calendar year).

The use of the ECI for adjustments to judicial, congressional, and high-level executive salaries departed from the previous mechanism for adjusting General Schedule salaries, which had turned on the recommendation of the President's agent. See p. 3, *supra*. Congress did not, however, fully disconnect adjustments to judicial salaries from adjustments to federal employees' salaries. Under the Ethics Reform Act, a precondition for an annual adjustment in judges' salaries is that the salaries of General Schedule employees also receive a comparability adjustment for the same year. See § 704(a)(2)(A), 103 Stat. 1769. Thus, if Congress enacts a law to prevent a comparability adjustment to the salaries of other federal employees for any particular year, judges also do not receive any such adjustment for that year. Moreover, Congress promptly made the two adjustment mechanisms still further related when it enacted the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. No. 101-509, § 529, 104 Stat. 1427. The FEPCA extended to General Schedule salaries the mechanism for adjustment based on the annual percentage change in the ECI. See 104 Stat. 1430 (enacting new 5 U.S.C. 5303)).[2]

e. Congress has in some years permitted and in some years denied salary adjustments for its own Members, for high-level Executive Branch employees, and for federal judges. In 1991, Congress increased federal judges' pay twice. First, in accordance with Section 703(a) of the Ethics Reform Act (see p. 6, *supra*), Congress increased the rate of basic pay for all federal

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[2] The ECI-based adjustment to General Schedule salaries, however, is not subject to the 5% cap on adjustment to judicial, congressional, and high-level executive salaries imposed by the Ethics Reform Act § 704(a)(1), 103 Stat. 1769; cf. 5 U.S.C. 5303(a).

judges by approximately 25%. Second, because General Schedule salaries were increased under the Comparability Act for 1991, judges also received an additional pay adjustment for 1991.

In 1992 and 1993, General Schedule rates of pay were again increased under the Comparability Act. Therefore, the Adjustment Act, as amended, provided for adjustments for federal judges' salaries in those years. Pet. App. 3-4. To satisfy the requirements of Section 140 of Public Law No. 97-92, Congress enacted laws specifically authorizing federal judges to receive those adjustments. See Pub. L. No. 102-140, § 305, 105 Stat. 810;[3] Pub. L. No. 102-395, § 304, 106 Stat. 1859.[4] For 1994, Congress enacted legislation cancelling any increases in General Schedule rates of pay under the Comparability Act. Pub. L. No. 103-123, § 517A, 107 Stat. 1253. Consequently, like other federal employees, federal judges did not receive any pay adjustment that year.

For 1995, 1996, 1997, and 1999, General Schedule rates of pay were increased under the Comparability Act. For each of those years, however, before the beginning of the calendar year when any adjustment to federal judges' rates of pay would have become effective, Congress enacted a law preventing any increase in the rates of pay for Members of Congress, high-ranking Executive Branch officials, and federal judges from

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[3] Public Law No. 102-140 provided: "Pursuant to section 140 of Public Law No. 97-92, Justices and judges of the United States are authorized during fiscal year 1992, to receive a salary adjustment in accordance with 28 U.S.C. 461."

[4] Public Law No. 102-395 provided: "Pursuant to section 140 of Public Law No. 97-92, Justices and judges of the United States are authorized during fiscal year 1993, to receive a salary adjustment in accordance with 28 U.S.C. 461."

taking effect. See Pub. L. No. 103-329, § 630, 108 Stat. 2424; Pub. L. No. 104-52, § 633, 109 Stat. 507; Pub. L. No. 104-208, § 637, 110 Stat. 3009-364; Pub. L. No. 105-277, § 621, 112 Stat. 2681-518. Thus, in each of those years, Congress by law prevented an otherwise scheduled cost-of-living increase from taking effect before the judges performed any service that would have entitled them to compensation. In addition, Congress did not enact any law for 1995, 1996, 1997, or 1999, specifically authorizing any adjustment in federal judges' salaries, as required by Section 140.

For fiscal year 1998, General Schedule rates of pay were again increased under the Comparability Act, and the Adjustment Act therefore provided for a pay adjustment for federal judges. Congress did not bar that increase, and it enacted a law under Section 140 specifically authorizing federal judges to receive the adjustment for 1998. Pub. L. No. 105-119, § 306, 111 Stat. 2493.

2. In 1997, petitioners brought suit on behalf of themselves and a class of similarly situated Article III judges, arguing that Congress violated the Compensation Clause by preventing salary increases for judges from going into effect in 1995, 1996, 1997, and 1999. Petitioners asserted that they acquired a constitutional right to receive cost-of-living increases for those years in 1989, when Congress passed the Ethics Reform Act and thereby created a formula for future automatic increases. The government argued, first, that judges had no statutory right to automatic salary increases because of Section 140 of Public Law No. 97-92, which prohibits adjustments to judicial salaries without affirmative congressional legislation; and second, that the laws blocking adjustment to judicial salaries in each of the four years were constitutional under *Will*, which

sustained similar laws blocking judicial salary increases before the dates on which those adjustments were to go into effect.

The district court granted summary judgment for petitioners.[5] The district court concluded that judicial salary increases "vested on the date of the enactment of the [Ethics Reform Act of 1989] conditioned only on adjustments being granted to General Schedule employees." Pet. App. 118. The court therefore rejected the government's argument that any salary increase for judges actually vests, for purposes of the Compensation Clause, only when judges begin to earn the salary (by performing judicial service for the period in which the salary is owing) or receive its benefits. Rather, the court reasoned, "the ECI adjustments became part of the judges' compensation due and payable to the judges when the Ethics Reform Act became law [in 1989]." *Id.* at 121.

The district court also held that Section 140 of Public Law No. 97-92 does not govern judicial pay increases because, despite Congress's many citations to it in legislation in the 1990s, Section 140 expired in 1982. Pet. App. 127. The court also held, in the alternative, that

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[5] The district judge noted that, although his own salary was potentially affected by the outcome of this case, the same was true of every other Article III judge as well. Thus, the court concluded, there is no Article III judge who does not have an interest in the case, and the Rule of Necessity permitted the district judge to rule on the case. See Pet. App. 106-107. The court of appeals agreed, *id.* at 7-8, and so do we. See *Will*, 449 U.S. at 214-217. In particular, we note that the case could not have been transferred to a judge in senior status because the salaries of senior judges are also adjusted pursuant to the Adjustment Act. See 28 U.S.C. 371(b)(2) (salaries of senior judges "shall be adjusted under section 461 of this title").

Section 140 was implicitly repealed by the Ethics Reform Act in 1989. *Id.* at 128-131.

3. a. A divided panel of the court of appeals reversed. Pet. App. 1-41. Although the court of appeals agreed with the district court that Section 140 had expired and therefore did not require affirmative congressional legislation to authorize a judicial salary adjustment, *id.* at 8-11, it held that the constitutionality of the laws blocking judicial salaries for the years in question was directly controlled by this Court's decision in *Will* sustaining similar blocking laws for Years 2 and 3. See *id.* at 22-30.

The court rejected petitioners' argument that the system for adjustments to judicial salaries established by the Ethics Reform Act of 1989 differed substantially from the pay-raise system discussed in *Will* and for that reason justified a different answer to the constitutional question. Pet. App. 22-30. In particular, the court rejected the contention that judges' entitlement to automatic salary increases under the current system "vested" for purposes of the Compensation Clause in 1989, when Congress enacted the Ethics Reform Act, whereas judges' entitlement to adjustments in the scheme reviewed in *Will* did not vest until the salary increases actually became effective on October 1. To the contrary, the court discerned that this Court's decision in *Will* "established a 'vesting' rule for Article III that is exclusively focused on whether the pay adjustments have become 'part of the compensation due and payable' to judges," *id.* at 23 (quoting *Will*, 449 U.S. at 229), and that the Ethics Reform Act of 1989 "did *not*, for Article III purposes, 'vest' the judges with any pay increases," *id.* at 25. The court also stressed that, in pertinent respects, the current system is not fundamentally different from the one reviewed in *Will*, be-

cause under both mechanisms, if the salaries of federal employees were to be adjusted for the year in question, adjustments to judicial salaries would also automatically take effect on the pertinent date unless Congress took affirmative action blocking the adjustments. *Id.* at 29. Thus, the court found it "impossible to distinguish the statutory scheme implemented in 1989, for purposes of application of the Article III compensation vesting rule laid down in *Will*." *Id.* at 30.

b. Judge Plager dissented. Pet. App. 42-99. In his view, the Ethics Reform Act was intended to guarantee judges automatic salary increases whenever the salaries of other federal employees were adjusted, and that guarantee was made part of the statutory definition of judges' compensation, which could not be constitutionally diminished. *Id.* at 80-85.

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. Section 140 of Public Law No. 97-92 independently supports the judgment below because it requires affirmative action by Congress through the passage of a new law to adjust judicial salaries, and no such law was enacted for the years in question. In addition, the court of appeals correctly ruled that the constitutionality of the congressional blocking laws challenged in this case is directly controlled by this Court's decision in *Will*. Finally, there is no merit to petitioners' contention that the challenged blocking laws impermissibly discriminated against federal judges.

1. Section 140 of Public Law No. 97-92 provides in pertinent 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.*

95 Stat. 1200 (emphasis added). The plain import of Section 140 is that no federal funds shall be expended to increase judicial salaries except as specifically authorized by Congress. No such law containing a specific authorization was passed by Congress for the years at issue in this case. Accordingly, petitioners are not entitled to receive any adjustment to their salaries for those years.

The court of appeals held that Section 140, which was part of a joint resolution authorizing continuing appropriations for federal programs, ceased to be effective after expiration of the period for which the appropriations were made. The court evidently relied on a presumption of statutory construction that, because an appropriation act is made for a particular fiscal year, everything contained in that act is effective only for the fiscal year covered. See Pet. App. 10-11; see also General Accounting Office, *Principles of Federal Appropriations Law* 2-29 (2d ed. 1991). That presumption, however, may be overcome when the "language used * * * or the nature of the provision makes it clear that Congress intended it to be permanent." *Ibid.*

Section 140 contains two indicators that Congress intended it to have effect beyond the period covered by

the continuing appropriations. First, Section 140 specifically provides that none of the funds appropriated by that law or by any other Act passed *after its enactment* may be used for judicial salary increases without express authorization by Congress. Second, Section 140 also specifically provides that adjustments to judicial salaries are prohibited "except as may be specifically authorized by Act of Congress hereafter enacted." As the Comptroller General has explained in concluding that Section 140 remains in effect (see Pet. App. 123-125), at the time Section 140 was enacted, judges' salaries were not scheduled for adjustment under the Adjustment and Comparability Acts until the beginning of the following fiscal year, after the appropriations in Public Law No. 97-92 were scheduled to expire. Thus, Congress's references in Section 140 to appropriations made under "any other Act" and to authorizations for salary increases under laws "hereafter enacted" were obviously directed to the possibility of a salary adjustment made *after* the appropriations in Public Law No. 97-92 expired, and so Section 140's prohibition is most sensibly understood to apply after that expiration as well.

Furthermore, against the background of the Comptroller General's repeated opinions in the 1980s concluding that Section 140 remains in effect, Congress has since consistently acted under the same understanding. Congress enacted laws specifically authorizing judicial salary increases for each year in which judges have received such increases, and in doing so, Congress expressly provided in the text of each of those laws that the adjustments were authorized "[p]ursuant to section 140 of Public Law No. 97-92." See Pet. App. 9. Thus, even if Section 140, standing alone, were thought to be ambiguous on the question, those subsequent enact-

ments constitute a declaration and ratification by Congress of the continuing force of Section 140. See *United States* v. *Alaska*, 521 U.S. 1, 44 (1997).

Contrary to the court of appeals' conclusion (Pet. App. 11), the provisions of the Ethics Reform Act of 1989 establishing a mechanism for adjustments to judicial salaries are not a law "hereafter enacted" within the meaning of Section 140. When Congress has specifically, authorized judicial salary increases, it has made express reference to Section 140. The Ethics Reform Act's general mechanisms for judicial salary adjustments make no such reference, however, just as the pre-existing network of laws providing for judicial salary adjustments made no such reference. By contrast, when Congress acted in the Ethics Reform Act to restore comparability adjustments to federal officers' and employees' salaries (including judicial salaries) that had been blocked or limited in previous years, it expressly stated that those adjustments were authorized for purposes of Section 140. See Ethics Reform Act § 702(c), 103 Stat. 1768. Accordingly, in the Ethics Reform Act itself, Congress recognized that Section 140 was still operative, but gave no indication that the Ethics Reform Act's provisions establishing a mechanism for judicial salary adjustments in future years, standing by themselves, were sufficient to satisfy Section 140's requirement of express authorization for judicial salary increases. And as we have explained, Congress thereafter acted in those future years on the understanding that Section 140 is still in effect, for it specifically authorized each pay increase for judges that occurred after enactment of the Ethics Reform Act pursuant to Section 140.

2. The court of appeals correctly concluded in any event that this Court's decision in *Will* requires rejec-

tion of petitioners' Compensation Clause claims. Pet. App. 2. *Will* established "a clear and simple rule for determining whether the repeal of a statutorily-mandated judicial pay increase runs afoul of Article III" (*id.* at 16): Congress may repeal an anticipated salary increase for federal judges at any time before that increase "vests" for purposes of the Compensation Clause, and "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 228-229 (emphasis added). That rule is based on the text of the Compensation Clause itself, which provides that judges "shall, at stated Times, *receive* for their Salaries, 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, 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.[6]

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[6] Although a salary increase takes effect on January 1 of a particular year, judges are not paid the salary for that month (including the increase beginning as of January 1) until that month is completed. Under *Will*, however, the operative date of the salary increase for purposes of the Compensation Clause is the date on which the judges begin to render services that are subject to the increased compensation (now, January 1)—*i.e.*, the date as of which the increased compensation becomes "due and payable," 449 U.S. at 229—not the date on which the judges are actually paid for those services. That is the point made in the passages quoted by petitioners (Pet. 25-26) from the Solicitor General's brief in *Will*.

The court of appeals correctly applied the constitutional rule laid down in *Will* to the facts of this case. All of the blocking statutes at issue in this case were enacted before the judicial pay increases became "due and payable" (*Will*, 449 U.S. at 229) on January 1 of the pertinent year. See Pet. App. 21. Accordingly, those blocking statutes did not "diminish" judges' preexisting compensation.

Petitioners' attempts to distinguish the judicial compensation scheme at issue in this case from the blocking statutes upheld in *Will* are without merit. While the two schemes are not identical, they are fundamentally similar in that each authorized an adjustment to judicial salaries as of a date certain, without the need for further congressional action, in any year in which other federal employees received salary adjustments. See Pet. 20 (noting that, under the scheme reviewed in *Will*, "[t]he President's plan [for comparability adjustments] would become law unless it was vetoed by either House of Congress within thirty days").[7] The court of appeals was thus correct in finding it "impossible to distinguish the statutory scheme implemented in 1989, for purposes of application of the Article III compensation vesting rule laid down in *Will*." Pet. App. 30.

Petitioners point out (Pet. 12) that, in property law, the concept of "vesting" is used to describe a future interest that has become protectible under the law. The Court's decision in *Will*, however, did not use the term "vest" in that technical sense, based on arcane principles governing future interests. To the contrary, the Court plainly used the word "vest" in *Will* as a

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[7] The legislative-veto aspect of the Comparability Act was removed when Congress enacted the FEPCA in 1990. See p. 7, *supra*.

shorthand to state the constitutional rule that judicial salary increases become irrevocable only once they take effect. See *Will*, 449 U.S. at 221 ("We must decide when a salary increase authorized by Congress under such a [previously enacted] formula 'vests'—*i.e.*, becomes irreversible under the Compensation Clause. Is the protection of the clause first invoked when the formula is *enacted* or when it *takes effect*?"); *id.* at 229 ("[A] salary increase 'vests' for purposes of the Compensation Clause only when it takes effect."). Indeed, the Court expressly rejected the contention that "Congress could not alter a method of calculating salaries before it was executed," because such a ruling would mean that "the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress." *Will*, 449 U.S. at 228. Thus, when Congress enacted laws preventing each of the salary increases at issue in this case from going into effect, it "in no sense diminished the compensation Article III judges were receiving; it refused only to apply a previously enacted formula." *Ibid.*[8]

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[8] Petitioners suggest (Pet. 13) that the Court's reference in *Will* to "an announced future intent" on the part of Congress that judicial salaries would be increased signified Congress's intent to enact a law in the future. That reading of *Will* is simply incorrect. Under the statutory scheme in *Will*, federal judges were to receive a salary increase in any year in which General Schedule salaries were increased, barring congressional intervention. See pp. 2-3, *supra*. That was Congress's "announced future intent" when it enacted the Comparability Act in 1975. Similarly, when Congress enacted the Ethics Reform Act, it announced its future intent that judges receive a salary increase based on the ECI in any year in which General Schedule salaries were adjusted. Nonetheless, Congress remains free to prevent such judicial salary increases from taking effect before January 1 of the year in question, just as this

Petitioners do not dispute that Congress could repeal entirely the mechanism for adjustment of judicial salaries, and that Congress could prevent any adjustment from going into effect by preventing a comparability adjustment for General Schedule employees. There is no basis for a constitutional rule that distinguishes those situations from the case in which Congress allows an adjustment to General Schedule salaries but disallows one for judicial, congressional, and high-level executive salaries before the adjustment takes effect. Petitioners argue (Pet. 13) that the adjustments authorized by the Ethics Reform Act are fundamentally different because they were enacted as part of a "bargain" by which federal judges agreed to forgo sources of outside income such as honoraria. But the Ethics Reform Act was not a contract between Congress and individual members of the federal judiciary; it was an exercise of Congress's authority, assigned to it by Article III of the Constitution, to establish the level of judicial compensation. Whether or not Congress's decision in subsequent years to disallow judicial salary increases was good policy, it did not "diminish[]" judges' compensation in the constitutional sense.

Nothing in *United States* v. *Hatter*, 121 S. Ct. 1782 (2001), calls into question the court of appeals' decision. In *Hatter*, the Court addressed whether extension of an existing tax to the federal judiciary for the first time unconstitutionally diminished judges' compensation. The principal issue in *Hatter* was whether only a reduction in judges' salaries as stated in law could "diminish" their "Compensation" within the meaning of Article III, or whether certain forms of taxation could also be held

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Court concluded in *Will* that it was free to prevent the adjustments from taking effect before October 1.

to constitute such a diminution. See *id.* at 1795. In this case, however, taxation is not at issue, and there has been no reduction in judges' stated legal salary. Rather, Congress merely stopped a planned increase in judges' salaries from going into effect by passing a law that barred the increase. Thus, Congress declined to allow a raise in judicial compensation, but did not diminish that compensation, either directly or indirectly. Congress is under no constitutional obligation to increase judges' salaries, and its enactment of a law to prevent an increase from occurring under a previously enacted law therefore does not implicate the Compensation Clause. See *Will*, 449 U.S. at 228.

Petitioners' reliance (Pet. 22-23) on the District of Columbia Circuit's decision in *Boehner* v. *Anderson*, 30 F.3d 156 (1994), is also misplaced. In *Boehner*, the court held that the Ethics Reform Act's provision for congressional salary adjustments (unless disallowed by Act of Congress) in any year in which General Schedule salaries are adjusted does not contravene the Twenty-Seventh Amendment, which provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. Const. Amend. XXVII. *Boehner* rejected the contention that each congressional salary increase may be effectuated only by a new "law" enacted pursuant to the constitutionally prescribed procedures in Article I for enacting a law, and also held that Congress may constitutionally provide for an increase in congressional pay for years in the future (whether by specifying salaries or providing an indexing formula), as long as an election of Representatives intervenes between enactment of the law providing for such increases and the subsequent increases themselves. 30 F.3d at 160-161.

Boehner thus involved a completely different question from the one presented here; and, contrary to petitioners' submission (Pet. 23), *Boehner* did not hold that the salary increases specified by the Ethics Reform Act were "chiseled in stone," in the sense that they could not be stopped by legislation before they took effect.

3. Finally, petitioners' contention that the blocking statutes discriminated against federal judges is without merit. As petitioners acknowledge (Pet. 29), those statutes affected not only the salaries of federal judges, but also the compensation of Members of Congress and high-level Executive Branch officials. When Congress changed the pay scheme in the Ethics Reform Act of 1989, it intended to maintain salary parity among those three groups. See 135 Cong. Rec. at 30,753, 30,756 (recommendation of bipartisan task force on ethics, to the effect that rates of pay for Members of Congress, district judges, and Executive Schedule Level II offficers should be the same). Congress is entitled to treat those three groups of highly responsible federal officials differently from the great majority of other federal employees. Under petitioners' arguments, however, Congress would have been required to allow salary increases for all federal judges to go into effect even as it permissibly prevented such increases from taking effect for the Vice President and Members of the Cabinet. Indeed, if petitioners' claim were upheld, then all district judges would be paid more than Members of Congress and about the same as Cabinet Secretaries, and circuit judges would earn more than any officers in the Executive Branch except the President and the Vice President. See 28 U.S.C. 5, 44(d), 135, and 252. Contrary to petitioners' claim, however, maintenance of salary parity among the top-level officials of the

government is manifestly not discrimination against the federal judiciary.

The Court's decision in *Hatter* is not to the contrary. In *Hatter*, the Court concluded that Congress had impermissibly discriminated against federal judges when it extended social security taxes to all federal officers and employees, but simultaneously allowed all officers and employees except federal judges (and the President) to escape the effective incidence of the tax. See 121 S. Ct. at 1788-1789, 1793-1795. The tax invalidated in *Hatter*, however, effectively diminished judges' net take-home pay, and therefore fell within a broad understanding of a constitutional diminution of judges' compensation. See *id.* at 1793 (noting that "[t]he new law imposed a substantial cost on federal judges with little or no expectation of substantial benefit for most of them"). Congress's failure to allow salary increases to take effect, however, does not amount to a "substantial cost" in the sense used in *Hatter*, namely, an actual deduction from judges' salary checks (*ibid.*).

Moreover, the tax invalidated in *Will* was discriminatory because it treated federal judges differently from even other high-level officials, such as Cabinet secretaries and Members of Congress, who were allowed to escape the incidence of the tax. See 121 S. Ct. at 1788, 1796. It did so, moreover, precisely because of what the Court perceived to be a constitutionally protected feature of judges' compensation for their current service—their statutory entitlement to receive undiminished retirement pay for that service. See *id.* at 1794.[9]

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[9] Contrary to petitioners' contention (Pet. 10-11), the logic of our position does not lead to the conclusion that retirement benefits that are measured by a judge's salary at the time of retirement can be eliminated altogether at any time before the judge retires.

Congress's failure to allow adjustments to judicial, congressional, and executive salaries in the years in question in this case does not operate in any similar fashion, and therefore works no discrimination against federal judges.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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A statutory provision for the receipt of benefits after retirement may be regarded as a deferred portion of a judge's *current* compensation for *current* services that cannot thereafter be "diminished." It could not reasonably be contended, however, that a statutory provision for increases in *future* compensation for *future* services—which necessarily are contingent upon Congress's failure to enact a law abrogating any such increases before they take effect—is part of a judge's *current* compensation for *current* services within the meaning of the Compensation Clause.