No. 99-1978

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

BRIEF OF THE LOS ANGELES COUNTY BAR ASSOCIATION

Filed January 5th, 2001

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTION PRESENTED

Whether Congress violated the Compensation Clause, U.S. Const. art. III, § 1, when it imposed a new tax that adversely affected only sitting federal judges.

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UNITED STATES OF AMERICA,

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v.

JUDGE TERRY J. HATTER, JR., *et al.*,

Respondents.

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

BRIEF OF THE LOS ANGELES COUNTY BAR ASSOCIATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BAR ASSOCIATION OF SAN FRANCISCO, CHICAGO BAR ASSOCIATION, CONNECTICUT BAR ASSOCIATION, FEDERAL BAR COUNCIL, ILLINOIS STATE BAR ASSOCIATION, AND NEW YORK COUNTY LAWYER'S ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are voluntary state and local bar associations, representing over 128,000 attorneys and judges, who practice

[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

before nearly every federal bar or preside in the federal courts. These bar associations are dedicated to improving the administration of justice and to upholding the highest principles of conduct in the legal profession. Each of the associations believes that an independent judiciary is one of the foundations of our legal system, and each has as one of its purposes the promotion of the independence of the judiciary.

Amici have a two-fold interest in this case. First, the legislation at issue deleteriously affects judicial compensation of sitting judges. Should Congress be permitted to take actions of this sort, then the independence of the judiciary may be compromised, qualified members of the bar may be discouraged from seeking judicial office (as recognized by the reports of the Administrative Office of the United States Courts), and those currently on the bench may be encouraged to leave it. Moreover, *amici* believe that financial disincentives to judicial service, on top of already large disparities in compensation between the federal judiciary and other members of the legal profession, will make judicial service attractive only to a select few, who may not be representative of the country's population as a whole, thereby diminishing the effectiveness and credibility of the federal judicial system.

Second, *amici* believe that the Compensation Clause in the United States Constitution means what it says, and that the federal judiciary has a fundamental right to be free from actions or threatened actions of Congress that diminish the judges' compensation, whether denominated as "taxes" or as "salary cuts." Because this case concerns the extent of Congress's power to legislate the compensation of judges, *amici* wish to present their views.

The Los Angeles County Bar Association was formed in 1878. It is the largest local voluntary bar association in the country, with over 23,000 members, including members of the judiciary. Among other activities, LACBA advocates for,

operates, and sponsors projects and activities designed to maintain a qualified and independent judiciary. LACBA also has standing committees on a variety of issues facing the judiciary and the judicial system.

The Association of the Bar of the City of New York is a voluntary bar association with over 21,000 members primarily from the greater New York City area. It was formed in 1870 to establish standards of conduct for all aspects of the legal profession, including the judiciary. It continues to be dedicated to ethics and the public interest, including the maintenance of an independent judiciary. The same sense of civic duty evident in its formation is carried on in its works at political, legal and social reform in the local, state, national and international arenas.

The Bar Association of San Francisco is a voluntary nonprofit membership association of over 9,000 members in the San Francisco Bay Area. Founded in 1872, the Bar Association of San Francisco enjoys the support of over four hundred sponsor firms, corporations and law schools. The association serves as a national leader in efforts to provide full and equal access to the system of justice, influence public policy and promote the effective administration of justice, engage in public service programs reaching out to youth and other vulnerable populations, and achieve equal opportunity in the legal profession and justice system for minorities, gay men and lesbians, and people with disabilities.

The Chicago Bar Association is a voluntary bar association with a membership of approximately 21,000 attorneys. Founded in 1874, the Association is dedicated to improving the administration of justice, promoting a strong and independent judiciary, and establishing and maintaining the honor and dignity of the legal profession.

The Connecticut Bar Association is a voluntary, not-for-profit association of lawyers and judges dedicated to promoting public service and advancing the principles of law and justice through its 11,000 members.

The Federal Bar Council is a voluntary association of about 2000 members of the legal profession, including members of the federal judiciary in the Second Circuit. Its purpose is to foster the highest standard of professionalism among the Federal Bar and to encourage the public good through the rule of law.

The Illinois State Bar Association is a voluntary membership, not-for-profit corporation with membership of over 32,000 attorneys and members of the judiciary. The Charter of the Association states in part that among its purposes is "to improve the prompt administration of justice through selection of qualified judges and adherence to effective standards of judicial administration and administrative procedure." The Association has sought to fulfill that goal through dedication to preservation of the independence of the judiciary, which is guaranteed in part by Article III, section 1 of the United States Constitution. Further, the Association was one of many bar association *amici* in *Spencer Williams, et al.* v. *United States*, U.S. Court of Appeals, Federal Circuit (No. 99-1572).

The New York County Lawyers' Association is a voluntary bar association founded in 1908. Its 9,000 members practice before the federal bar in New York and elsewhere. Among the Association's purposes are the promotion of the highest standards of conduct in the legal profession, improvement in the administration of justice, and support for the independence of the judiciary.

STATEMENT[2]

1. Respondents are federal judges who were appointed to the bench prior to 1983. Pet. App. 30a. At the time they took office, respondents enjoyed a status unique among the ranks of federal employees, as well as Americans generally: They were not required to pay for their publicly financed retirement benefits. *Id.* at 14a. Thus, prior to 1983, respondents were exempt from paying Social Security taxes applicable to nearly all private-sector employees, J.A. 41, and they were exempt from making the mandatory contributions to the Civil Service Retirement System (CSRS) required of nearly all federal employees, see 5 U.S.C. § 8331 *et seq.* Instead, upon meeting certain age and service requirements, respondents were guaranteed a lifetime annuity equal to their judicial salary at the time of retirement, entirely at taxpayer expense. See 28 U.S.C. § 371; Pet. App. 49a.

Effective January 1, 1984, Congress changed the status quo in a manner that singularly disadvantaged sitting federal judges. Pursuant to the Social Security Amendments of 1983, Pub. L. No. 98-21, § 101, 97 Stat. 65, 67-70, Congress enacted new rules governing the withholding of Social Security taxes from the salaries of federal employees. The impact of the amendments varied depending on the category of employees involved.

Incumbent federal employees (those employed by the federal government as of December 31, 1983) were largely unaffected by the change in the law, with certain minor exceptions noted below. Incumbent employees remained exempt, as they had been before, from paying the old-age,

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[2] This statement is based on the declarations and exhibits filed by the parties in the Court of Federal Claims, which are reproduced in the Joint Appendix ("J.A."), and on the opinions of the trial court and court of appeals, which are reproduced in the Petition Appendix ("Pet. App.").

survivors, and disability insurance (OASDI) portion of Social Security taxes, which at the time amounted to 5.7% of an employee's salary. J.A. 47.[3] Instead, they continued to make mandatory contributions equal to 7% of their salaries to the CSRS. *Id.* at 112.

All federal employees hired after January 1, 1984, were affected more directly. For the first time, Congress required these employees to pay the 5.7% OASDI tax. Newly hired employees were still subject to withholding under the CSRS as well, however. To insure that newly hired employees did not pay any more in taxes than incumbent employees, Congress reduced the amount of the CSRS contribution for newly hired employees to 1.3%. Pet. App. 49a; J.A. 64. Thus, newly hired employees paid a total of 7% of their salaries for retirement benefits, the same amount paid by those who were hired before January 1, 1984.

Congress did require a small number of federal employees to begin paying the OASDI tax effective January 1, 1984, even though they were hired before that date. This category of incumbent employees consisted primarily of congressional officials, high-level Executive Branch officials, and federal judges. J.A. 63. Congress provided the affected Legislative and Executive Branch officials with options that insured they would pay no more for retirement benefits than they had before the change in the law. Thus, employees who were already covered by CSRS could elect to forgo CSRS coverage and receive a refund of their past contributions. They would thereby eliminate the 7% CSRS withholding altogether, and pay Social Security taxes alone. Alternatively, these employees could elect to remain under the CSRS and take advantage of the same reduction in CSRS withholding afforded newly hired employees, thereby reducing their mandatory CSRS contributions to 1.3%. *Id.* at 64.

[3] Incumbent federal employees were nonetheless required to pay the Medicare hospital insurance (HI) portion of Social Security taxes. J.A. 47. Congress had mandated that all federal employees, including federal judges, begin paying the HI tax for the first time effective January 1, 1983. *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 278, 96 Stat. 324, 559.

Federal judges, however, were the only incumbent employees who were not provided any options allowing them to offset the economic impact of Social Security withholding. J.A. 70. Moreover, federal judges were now forced to pay Social Security taxes for old-age benefits that they did not need (given their lifetime annuities and the fact that most were already fully entitled to Social Security benefits because of pre-judicial contributions), see *id.* at 115, and for survivor benefits for which most had already made other arrangements (such as through the Judicial Survivors' Annuity Fund, see 28 U.S.C. § 376). J.A. 121.

2. Respondents challenged the constitutionality of the new Social Security taxes imposed on them by bringing suit in what was then the United States Claims Court. They argued that the Social Security taxes violated the Compensation Clause of Article III for two reasons: (1) the Clause prohibits any diminishment, by means of a new tax or otherwise, of the salaries of judges who, like respondents, took office prior to enactment of the tax; and (2) even if imposition of a generally applicable tax would not violate the Compensation Clause, the new Social Security taxes were discriminatorily imposed on sitting federal judges and were therefore invalid. Pet. App. 39a-40a.

The Claims Court rejected respondents' first argument by declining to follow this Court's decision in *Evans* v. *Gore*, 253 U.S. 245 (1920). There, the Court held invalid the imposition of a new federal income tax on the salary of a federal judge who had been appointed prior to the enactment of the tax at issue. The Court made clear that the Compen-

sation Clause prohibits both direct and indirect reductions of a federal judge's compensation:

> Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect . . . . But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition.

Id. at 254. Though *Evans* was controlling authority on the issue before it, the Claims Court viewed *Evans* as having been undermined by subsequent decisions, and therefore disregarded it. See Pet. App. 40a-43a.

The Claims Court also rejected respondents' second argument, even though the court found that imposition of the OASDI tax discriminated against sitting federal judges. The court noted that, generally speaking, "Congress reduced or offset the contribution federal employees were required to make to their retirement plan by the amount of any newly required Social Security tax." Pet. App. 49a. As a result, for most federal employees, inclusion in Social Security resulted in "no change in take-home pay." *Id.* Significantly, however, the court found that judges, "with no retirement plan contributions to offset, were *unique among federal employees* in seeing their take-home pay necessarily decrease by the amount of the Social Security tax." *Id.* at 50a (emphasis added). Notwithstanding this finding, the court then inexplicably concluded that "judges are being treated no worse than other federal employees and citizens." *Id.* Based on this conclusion, the Claims Court held that the Compensation Clause had not been violated. *Id.*

3. The Court of Appeals for the Federal Circuit reversed. Pet. App. 54a-66a. The court had little difficulty concluding that, under *Evans*, the new Social Security taxes imposed on respondents were invalid. *Id.* at 59a. The court of appeals

held that judges who took office prior to the enactment of a new tax suffer an impermissible diminution of their compensation, regardless of whether the tax is one of general applicability. *Id.* at 64a. Thus, the Federal Circuit had no occasion to reach respondents' argument that the 1983 Social Security Amendments were also invalid because they discriminated against federal judges.

4. The government petitioned this Court for a writ of certiorari. The Court was unable to act on the government's petition, however, because four Justices recused themselves, leaving the Court without the required quorum of six Justices. See 28 U.S.C. § 1. A majority of the non-recused Justices did not believe the case could be heard at the next Term of the Court, which led the Court to issue an order pursuant to 28 U.S.C. § 2109 affirming the judgment of the Federal Circuit. Pet. App. 69a.

5. On remand, the Court of Federal Claims (the successor to the Claims Court) proceeded to determine the amount of damages owed each of the respondents as a result of the Compensation Clause violation. The court made two rulings on remand that drastically limited the amount of respondents' recovery. First, the court held that any violation of the Compensation Clause resulting from the imposition of Social Security taxes in 1984 was "cured" shortly thereafter when Congress raised salaries for all federal judges. Pet. App. 82a. Second, the court held that recovery for many of the tax years in question was barred by the statute of limitations. *Id.* at 90a-105a. A three-judge panel of the Federal Circuit reversed the first of these rulings, *id.* at 115a-125a, and the court sitting en banc reversed the second ruling relating to the statute of limitations, *id.* at 3a-11a. This court then granted the government's second petition for certiorari. J.A. 143.

SUMMARY OF ARGUMENT

The Court need not decide here whether *Evans* v. *Gore*, 253 U.S. 245 (1920), should be overruled. There, the Court held invalid a generally applicable, non-discriminatory income tax as applied to an Article III judge who was appointed to the bench before the tax was enacted. Putting *Evans* v. *Gore* aside, there has never been any question that imposition of a *discriminatory* tax on sitting federal judges violates the Compensation Clause. *O'Malley* v. *Woodrough*, 307 U.S. 277, 282 (1939). The power to impose discriminatory taxes on judicial salaries poses the same threat to judicial independence as the power to impose an outright reduction in salary. Thus, not even the government seriously disputes that a discriminatory tax imposed solely on federal judges would be invalid.

The Social Security Amendments of 1983 imposed precisely the sort of discriminatory tax on federal judges that the Compensation Clause forbids. For the first time, Congress required federal employees to pay Social Security taxes. But Congress exempted almost all incumbent employees from paying any portion of the 5.7% OASDI tax, and provided newly hired employees with offsets that left them paying the same amount in taxes that they would have paid had the amendments never taken effect. Only sitting federal judges were required to pay the OASDI tax without any adjustment allowing them to offset the economic impact of Social Security withholding. As a result, federal judges alone were forced to pay 5.7% more of their salaries in taxes than before the amendments took effect. No other group of American taxpayers was forced to bear this added tax burden. The Compensation Clause bars Congress from diminishing the compensation of sitting judges in this selective fashion.

ARGUMENT

CONGRESS VIOLATED THE COMPENSATION CLAUSE WHEN IT IMPOSED A NEW SOCIAL SECURITY TAX THAT ADVERSELY AFFECTED ONLY SITTING FEDERAL JUDGES.

In *Evans* v. *Gore*, 253 U.S. 245 (1920), this Court held that the Compensation Clause bars Congress from imposing an income tax on the salary of a federal judge who was appointed to the bench prior to the enactment of the tax. As the Federal Circuit recognized, that holding controls the outcome of this case, because respondents were appointed to the bench before Congress first imposed Social Security taxes on their salaries. Not surprisingly, the government argues at length that *Evans* should be overruled, contending that the soundness of the Court's reasoning in that case has been called into question by subsequent decisions. U.S. Br. 17-28.

The government's arguments for overruling *Evans* are not persuasive. The Court's core holding – that Congress may not indirectly diminish the compensation of a sitting federal judge by imposing a new tax on the judge's salary – is as sound today as it was 80 years ago. However, the Court need not decide here whether *Evans* has "withstood . . . the test of time," U.S. Br. 28, because this case can be resolved on a narrower ground whose legal principles are not in dispute. The government itself "assumes" that a discriminatory tax imposed solely on federal judges would "contravene fundamental principles underlying Article III, if not the [Compensation] Clause itself." *Id.* at 37 n.27. The Social Security amendments at issue here are invalid because they discriminated against sitting federal judges. Those judges alone were singled out for a tax increase that did not adversely affect any other group of American taxpayers. Such a tax plainly violates the Compensation Clause.

I. CONGRESS MAY NOT DIMINISH THE COMPENSATION OF SITTING FEDERAL JUDGES BY IMPOSING DISCRIMINATORY TAXES ON THEIR SALARIES.

Article III, section 1, provides:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The purpose of this provision is manifest: to assure the independence of the Judiciary as a separate and co-equal branch of government. *United States* v. *Will*, 449 U.S. 200, 218 (1980). The Framers recognized that protecting judges' tenure in office was a necessary but not a sufficient condition to secure such independence. As Alexander Hamilton eloquently observed:

> In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter."

The Federalist No. 79, at 472 (Clinton Rossiter ed., 1961) (emphasis omitted). The Compensation Clause embodies the common-sense determination that the power to deprive judges of their means of financial support would be just as potent a threat to judicial independence as the power to remove judges from office at will.

The Framers chose their words carefully when specifying the protection from financial attack that they intended to confer upon Article III judges. The Framers declared that a

judge's "[c]ompensation" shall not be "diminished" during the judge's term in office. The Framers did not provide, as the government suggests, that a judge's *salary* shall not be *reduced*. Indeed, Hamilton noted that the Framers had rejected the phrasing used by a number of contemporary state constitutions, which provided that judges would be afforded "permanent salaries," because experience had shown that such a formulation was "not sufficiently definite to preclude legislative evasions." *Id.* The Court merely followed the Framers' intent when it held in *Evans* that the Compensation Clause bars both direct reductions of a judge's salary, as well as indirect diminution of a judge's compensation through more evasive means, such as taxation. 253 U.S. at 254-55.

A reading of the Compensation Clause that would prohibit Congress from cutting judicial salaries by 20%, but permit it to achieve the same end by imposing a 20% tax on those salaries, would negate the very purpose of the Clause. Indeed, under that reading of the Clause, nothing would prevent Congress from imposing a 90% income tax on judges in an attempt to render them destitute. Of course, Congress would be unlikely to impose a 90% income tax on all taxpayers in order to punish judges. But so long as Congress is permitted to impose special taxes that affect judges alone, it is free to engage in financial attacks on judicial independence without fear of political backlash. Given their small numbers, federal judges can hardly rely upon the "political constraints" that may keep Congress from imposing unduly burdensome taxes on the general public. See U.S. Br. 34 n.24. Thus, even in upholding an income tax imposed on judges who were appointed *after* the tax was enacted, the Court has emphasized that such a tax is valid only to the extent that it is nondiscriminatory and laid generally on all employees. See *O'Malley* v. *Woodrough*, 307 U.S. 277, 282 (1939).

The imposition of taxes that adversely affect judges alone poses obvious threats to the Judiciary's independence and the

core values embodied in the Compensation Clause. Thus, even the government does not dispute that discriminatory taxation of judges results in a "diminution" of their compensation within the meaning of the Clause. U.S. Br. 37 n.27.[4] Yet, as explained below, the 1983 Social Security Amendments involved precisely the sort of discriminatory taxation of judges that even the narrowest reading of the Compensation Clause condemns.

II. THE 1983 SOCIAL SECURITY AMENDMENTS DISCRIMINATED AGAINST SITTING FEDERAL JUDGES BY IMPOSING AN ADVERSE FINANCIAL IMPACT ON THEM ALONE.

As alluded to earlier, when Congress first imposed Social Security taxes, it exempted nearly all federal employees, including all federal judges, from payment of those taxes. Pet. App. 55a. Most federal employees, however, were not afforded retirement benefits free of charge; they were required to pay a tax on their salaries to fund the CSRS. *Id.*

Judges alone were exempted from the payment of any income tax to pay for retirement benefits; instead of participating in the CSRS, they were eligible to receive a lifetime annuity payable from general tax revenues. See 28 U.S.C. § 371. Thus, as of December 31, 1983, Congress had extended a unique tax exemption to all Article III judges. They were subject to neither the 7% withholding required of most federal employees, J.A. 112, nor the 5.7% OASDI tax

[4] Of course, that concession undermines the government's principal argument, which is that a generally applicable, non-discriminatory tax does not effect a "diminution" within the meaning of the Clause at all. *See* U.S. Br. 29. A tax either does or does not diminish a judge's compensation; whether the tax also happens to diminish the compensation of others who are not protected by the Clause is wholly irrelevant to that determination.

imposed on nearly all private-sector employees, J.A. 47. See Pet. App. 14a.

When it enacted the 1983 Social Security Amendments, however, Congress stripped judges of this exemption by imposing a new 5.7% income tax that had no adverse impact on the compensation of any other group of federal employees. The vast majority of incumbent federal employees paid no portion of the 5.7% OASDI tax at all; they simply continued to have 7% of their salaries withheld under the CSRS, and thus suffered no impact from the amendments, adverse or otherwise. Newly hired federal employees were subject to the 5.7% tax, but their contributions to the CSRS were reduced to 1.3%, leaving them paying the same 7% of their salaries that they would have paid had the amendments never taken effect. With one exception, the small group of incumbent federal employees who were forced to pay the 5.7% OASDI tax were given options to insure that they would not have to pay more in taxes than they had prior to January 1, 1984. The one exception, of course, was sitting federal judges, who alone among federal employees were forced to pay 5.7% more of their salaries in taxes than they had been required to before January 1, 1984.

The effect of the 1983 Social Security Amendments would have been no different had Congress simply passed a special 5.7% surtax on the salaries of all federal judges while leaving the tax burden of the remainder of the population unchanged. Thus, contrary to the government's suggestion, judges were left without *any* "protection in the political system against excessively burdensome income taxes." U.S. Br. 36. They could not hope to band together with like-minded fellow citizens to protest a new and unwanted tax burden, for no other citizens were affected and thus none had reason to be concerned. The form of discriminatory taxation imposed here, if left unchecked, would allow Congress to exert the

very control over judges' "subsistence" that the Framers sought to prevent.

In defense of the 1983 Amendments, the government makes two related points that are readily dismissed. First, the government asserts that no Compensation Clause violation occurred here because Congress merely "equalized" the tax treatment of federal judges and the rest of the general workforce. *Id.* at 39-40. What the government acknowledges but then quickly overlooks, however, is the fact that, prior to January 1, 1984, Congress had extended to judges alone a special exemption that no other group enjoyed. Eliminating that exemption to "equalize" the tax treatment of judges and the general population necessarily disadvantaged judges to the exclusion of anyone else. See Pet. App. 50a. The Compensation Clause does not permit Congress to diminish the compensation of sitting judges in this selective fashion.

Second, the government argues that, at most, respondents quibble over the fact that Congress achieved in two steps what it could have accomplished in one. U.S. Br. 34. That is to say, under the government's reading of the Compensation Clause, Congress could have imposed the OASDI tax on judges when it first imposed the tax on the general public. In the government's view, then, the fact that Congress delayed imposition of the tax on judges until taking the second step in 1983 is of no constitutional concern.

This assertion is flatly inconsistent with the core purpose of the Compensation Clause, as a simple hypothetical illustrates. Assume that when Congress first enacted the income tax, it subjected the general public to a 30% tax rate, but imposed a special rate of only 15% on federal judges. Suppose further that, some time later, displeased with decisions rendered by the courts, Congress announced that henceforth all federal judges would be subject to the same 30% tax rate applicable to other taxpayers. A discriminatory doubling of the income

tax rates applicable to judges alone would unquestionably violate the Compensation Clause for the reasons noted above. Such a conclusion merely acknowledges that, absent the protection of the Clause, Congress could use the discriminatory withdrawal of tax benefits to threaten judicial independence in the same manner that it could use discriminatory tax assessments to bend the Judiciary to its will.

The 1983 Social Security Amendments at issue here are no different in effect from the hypothetical just described. Congress may have sought to achieve parity in the way judges and the rest of the workforce were treated with respect to payment of the OASDI tax, but in doing so it singled out sitting judges for a new financial burden that no other group of taxpayers had to endure. Treating judges in this fashion poses the same potential threat to judicial independence as imposition of an outright pay cut. The Framers deliberately removed from Congress the power to diminish judicial compensation – for whatever purpose – by formulating a bright-line standard that allows no exceptions. See *Evans*, 253 U.S. at 255. The line chosen by the Framers should be adhered to in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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