Case No. 2010-5012

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Peter H. Beer, Terry J. Hatter, Jr.,
Richard A. Paez, Laurence H. Silberman,
A. Wallace Tashima and U.W. Clemon,

Plaintiffs-Appellants,

v.

United States,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in Case No. 09-CV-037, Senior Judge Robert H. Hodges, Jr.

BRIEF OF AMICI CURIAE BAR ASSOCIATIONS IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Peter H. Beer et al. v. United States

No. 2010-5012

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4/16/2012
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Signature of counsel

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cc: Christopher Landau (appellants) Kirkland & Ellis LLP ,Brian M. Simkin (USDOJ)

Form 9

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Not applicable

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

LEGISLATIVE HISTORY

SCHOLARLY AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF AMICI CURIAE[1]

Amici are diverse bar associations with a keen interest in a strong and independent federal judiciary. The erosion of real judicial salaries by inflation makes it harder to attract and retain highly qualified lawyers to the federal bench, and is inconsistent with the Framers' vision of an independent judiciary that would not be forced routinely to petition Congress to maintain its compensation. Amici demonstrate that Congress addressed these problems in the Ethics Reform Act of 1989 (the "1989 Act") by vesting judicial pay adjustments. The contrary interpretation by the divided panel in *Williams* v. *United States*, 240 F.3d 1019 (Fed. Cir. 2001), should be revisited and overruled by this Court en banc.

SUMMARY OF ARGUMENT

Protecting judicial pay "is not intended for the benefit of the judges, but to enhance the quality of justice for everyone." *Williams* v. *United States*, 264 F.3d 1089, 1090 (Fed. Cir. 2001) (Mayer, C.J., dissent from denial of en banc review) (citing *Evans* v. *Gore*, 253 U.S. 245, 253 (1920)). Inflation has sharply cut real judicial pay, discouraging an increasing number of highly qualified lawyers from remaining on, or joining, the bench. *See* § I, *infra.* In the 1989 Act, Congress

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[1] No party's counsel authored this brief in whole part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person other than amici, their members, or counsel contributed money intended to fund preparing or submitting the brief. Fed. R. App. P. 29(c)(5). All parties consent to the filing of this brief. Fed. Cir. R. 29(c). Amici members who are government attorneys played no role in the decision to file this brief or its content.

sought to solve this problem by providing federal judges with a vested right to future pay that may not be reduced without violating the Compensation Clause. The contrary ruling in *Williams* is inconsistent with (i) the text and purposes of the 1989 Act; (ii) the animating principles of the Compensation Clause; (iii) Supreme Court treatment of other federally created vested rights; and (iv) the common law governing the vesting of future interests. *See* § II, *infra.* Because the petition raises an issue of great importance to the administration of justice, the Court should grant en banc review and hold that the Act provides a vested, enforceable right to a particular level of judicial pay.

ARGUMENT

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

By virtually any measure, real judicial pay has decreased substantially in recent decades—with attendant risks to the constitutionally enshrined value of an independent judiciary characterized by lifetime service and insulation from political pressure. The Administrative Office of the U.S. Courts reports that denials of 1989 Act cost-of-living adjustments ("COLAs") in recent years have created "major and growing financial losses for judges." Fed. Jud. Pay Increase Fact Sheet, http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/JudicialPayIncreaseFact.aspx (last viewed Apr. 12, 2012) ("*Fact Sheet*"). For example, a district court judge serving since 1993 "failed to receive a total of

$283,100 in statutorily authorized but denied pay." *Id.* Viewed comparatively, judges sitting in recent years receive less than 80% of the real income of judges sitting in 1969. *See, e.g.*, ABA & FBA, *Fed. Jud. Pay: An Update On The Urgent Need For Action* 12-13 (2003) ("*ABA Update*"). From 1969 to 2002, the average American worker's real wages rose 17.5%, but real pay for judges fell 23.5%. *Id.* at 13. And, while judicial pay once led that of top law school deans and senior professors, judges now are paid "substantially less than–about half" of those amounts. *2006 Year-End Report on the Fed. Jud.* 2 (2007).

At the same time, federal dockets have grown in volume and complexity. Between 1969 and 2011, filings more than tripled in district courts (from 110,778 to 367,692), and grew fivefold in appellate courts (10,709 to 55,126). *ABA Update* 18-19; *2011 Year-End Report on the Fed. Jud.* 13 (2012). Judges today oversee complex multidistrict litigation, class actions, intellectual property disputes, and scientific issues requiring sophisticated case management and analysis, *ABA Update* 20, and "must respond with wisdom and skill acquired from study, reflection, and experience," *2008 Year-End Report on the Fed. Jud.* 7 (2008).

Yet experienced judges increasingly are leaving the bench. Over 120 Article III judges have resigned since 1990, *Fact Sheet*, whereas only three left between 1958 and 1969, 22 in the 1970s, and 41 in the 1980s, *ABA Update* 21 *Chart G.* These judges often cite financial concerns as an important reason for their

departures.[2] Such early departures hurt the judicial system, which loses the efficiency and wisdom gained from a judge's years of experience, *2008 Year-End Report* 7, and the benefit of senior judges, who can help ease docket congestion. *See* Blake Denton, *The Fed. Jud. Salary Crisis*, 2 Drexel L. Rev. 152, 160 (2009).

Declining real pay discourages high quality, economically diverse lawyers from judicial service. *E.g.*, *2001 Year-End Report on the Fed. Jud.* (2002); *2002 Year-End Report on the Fed. Jud.* (2003). As the Chief Justice observed, "the government must attract and retain the finest legal minds, including accomplished lawyers who are already in high demand, to join the bench as a lifelong calling." *2008 Year-End Report* 7. Yet, many "'young lawyers with family obligations and established prominent lawyers . . . feel that they cannot afford to go on the federal bench.'" *ABA Update* 23. As one early-resigning judge warned, declining real pay may limit judicial service to "'people who are filthy rich and for whom salary makes no difference.'" Stephen Barr, *Lagging Jud. Pay Gives Some People Second Thoughts About Careers on the Bench*, The Wash. Post, Mar. 11, 2001, C-2 (quoting Judge Barrage).

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[2] *E.g.*, Wall St. J. Law Blog, *With Larson's Resignation, Jud. Pay Back in the News* (Sept. 17, 2009, 2:56 p.m.); Scott Duke Kominers, *Salary Erosion and Fed. Jud. Resignation* 1 (Sept. 25, 2008), *available at* http://ssrn.com/abstract=1114432 (pay has "striking effect" on resignations); Admin. Office of the U.S. Courts, *Insecure About Their Future: Why Some Judges Leave the Bench*, The Third Branch, Feb. 2002; *ABA Update* 15; Emily Field Van Tassel, *Why Judges Resign: Influences on Fed. Jud. Service* 12-17 (1993).

II. THE EN BANC COURT SHOULD GRANT REVIEW AND HOLD THAT ABROGATING ADJUSTMENTS MANDATED BY THE ETHICS REFORM ACT OF 1989 VIOLATES THE CONSTITUTION.

The 1989 Act was designed to remedy these problems by providing federal judges with a vested right to future compensation that may not be reduced without violating the Compensation Clause. The contrary ruling in *Williams* was not, as the panel believed, compelled by *United States* v. *Will*, 449 U.S. 200 (1980). For a variety of reasons, the decision in *Williams* should be revisited and overruled.

First, the 1975 Adjustment Act at issue in *Will* differed in critical respects from the 1989 Act. The former tied pay increases to a *discretionary* process. *See id.* at 203-04; *Williams* v. *United States*, 535 U.S. 911, 917 (2002) (Breyer, J., dissent from denial of certiorari) (*Will*'s COLAs "were neither definite nor precise"). *Will*'s holding that the Compensation Clause protected pay increases under that Act only when they "*take effect*" reflected the discretionary, non-vested nature of the increases the Adjustment Act authorized, *Will*, 449 U.S. at 221-30, not the scope of protection afforded by the Compensation Clause itself.

In contrast, the *mandatory* language of the 1989 Act created a vested right to pay adjustments whenever pay for General Schedule ("GS") employees is adjusted. The Act provided that "the annual rate of pay for positions at each level of the Executive Schedule *shall* be adjusted by an amount . . . equal to the percentage of such annual rate of pay which corresponds to the most recent percentage change in

the [Employment Cost Index]." 5 U.S.C. § 5318(a). This language mandated judicial pay adjustments when the triggering GS adjustments occur, as they did each year at issue here. As the *Williams* dissent explained, "[f]ixing future salaries by adopting an indexing plan is the same for all intents and purposes as specifying actual dollars." 264 F.3d at 1091 (quoting *Boehner* v. *Anderson*, 30 F.3d 156, 162 (D.C. Cir. 1994) ("We see no reason whatsoever why the Congress cannot, for convenience, instead specify an index or formula with the same effect.")).

The structure of the Act confirms that its salary adjustments are mandatory. The Act imposed substantial limits on outside income and mandatory workloads for senior judges. 5 U.S.C. app. §§ 501(a), 502; 28 U.S.C. § 460. Mandatory salary adjustments were a counterweight to these changes—an "integral part of the total ethics package" so that judges had "less need to supplement income from outside sources." 135 Cong. Rec. H9253, H9266 (daily ed. Nov. 21, 1989).

Legislative history underscores our point. The 1989 Act emerged from the Congressional Task Force on Ethics, which recognized that "[f]ederal judges are resigning at a higher rate than ever before" and urged a "fundamental departure from the [prior] system" to ensure that COLAs are reliably paid. *Id.* at H9264. Unlike the Adjustment Act, which left judges merely "eligible" for adjustments, the 1989 Act "provides" adjustments. *Id.* at H9269. Thus, the 1989 Act sought to

cure the Adjustment Act's deficiencies by establishing "automatic COLAs for judges." 135 Cong. Rec. H8732, H8761 (Rep. Kastenmeier).

In short, because *Will* addressed discretionary pay increases under the Adjustment Act, it should not be read to bar Congress from creating vested, future contingent rights to pay increases that trigger Compensation Clause protection.

Second, recognizing that Congress *can* create such constitutionally protected future rights is consistent with the purposes of the Compensation Clause. The Clause was designed to attract talent to the bench and ensure its "independence." *Evans* v. *Gore*, 253 U.S. 245, 253 (1920), *overruled on other grounds*, *United States* v. *Hatter*, 532 U.S. 557 (2001). The Framers wanted a judiciary that would "never be controlled by, or subjected, directly or indirectly, to, the coercive influence" of other branches of government. *O'Donoghue* v. *United States*, 289 U.S. 516, 530 (1933). Yet, as Alexander Hamilton famously began Federalist Paper 79, "*a power over a man's subsistence amounts to a power over his will.*" *Id.* Thus, the Clause bars direct or indirect reductions of pay, *Hatter*, 532 U.S. at 569—including "'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.'" *O'Donoghue*, 289 U.S. at 533 (quoting *Evans*, 253 U.S. at 254).

The Framers knew inflation would diminish the real value of judicial pay over time, *Will*, 449 U.S. at 219-20, with negative effects on judicial independence,

e.g., Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. Rev. 308, 312-15 (1976). Unable to find a fixed constitutional formula for pay increases, the Framers gave Congress authority to provide *upward* adjustments. *Id.* at 314. That solution, however, creates perennial tension between the need for a judiciary not unduly dependent on a purse-controlling Congress, and Congress's accountability to an often cost-conscious electorate. An interpretation of the Compensation Clause that allows Congress to effectively bind itself to fund vested, future (albeit contingent) judicial pay increases eases this tension in a manner that furthers the purposes of the Clause.

Third, Supreme Court precedent involving other statutorily created contract rights supports recognition of a vested right here. *Williams* recognized that the 1989 Act sought to remove judicial pay from ongoing political processes, but the panel believed (incorrectly) that the Congress that passed the Act lacked power to bind a future Congress until a COLA became "due and payable." 240 F.3d at 1039-40. To be sure, an earlier Congress generally may not commit a later one. *Newton* v. *Comm'rs*, 100 U.S. 548, 559 (1879). But an important exception exists where, as here, Congress creates vested rights entitled to constitutional protection.

For example, "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch* v. *United States*, 292 U.S. 571, 579 (1934); *see Mobil Oil Exploration & Producing SE, Inc.* v. *United States*, 530

U.S. 604, 607, 620 (2000) (statute cannot undo contract rights); *Perry* v. *United States*, 294 U.S. 330, 350-54 (1935) (U.S. cannot repudiate contracts); *United States* v. *Winstar*, 518 U.S. 839, 922-23 (1996) (plurality opinion) (Scalia, J., concurring) (U.S. cannot repudiate regulatory contract). The contracts in these cases created legitimate reliance expectations that were protected by the Due Process Clause. Similarly, the 1989 Act created expectations and justifiable reliance on its promise of future pay in federal judges. Like the Due Process Clause, the Compensation Clause has an "expectations-related purpose." *Williams*, 535 U.S. at 917 (Breyer, J., dissent from denial of certiorari). After the Act, judges reasonably expected COLAs in their future pay. *Id.* at 911-12. Neither Congress nor federal judges would have foreseen the abrogation of COLAs, especially given that the Act was designed to protect judicial pay from inflation, limit other sources of judicial income, and insulate COLAs from future political interference. The logic of *Williams* "would permit legislative repeal of even the most precise and definite salary statute—any time before the operative fiscal year in which the new nominal salary rate is to be paid." *Id.* at 918. That result is barred because "[t]he Compensation Clause assures judges that, once Congress has made a decision, a later Congress cannot overturn it." *Id.* at 920.

Fourth, background common law principles governing the vesting of future interests support petitioners' interpretation of the Act. Under established law, two

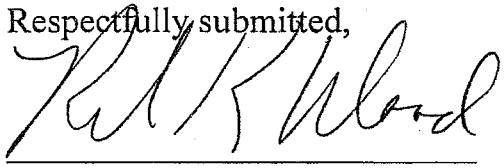
conditions must be met for a future interest to vest: (1) the future owner must be identified, and (2) there must be sufficient certainty that property will transfer. *See, e.g.*, William Blackstone, 2 *Commentaries* *168; Lewis M. Simes & Allan F. Smith, *The Law of Future Interests* § 65, at 54-55 (2d ed. 1956). The *Williams* panel recognized that applying "garden-variety future interests" law would result in holding that the right to future pay vested here. 240 F.3d at 1038. But the panel believed *Will* "departed from traditional vesting rules" and announced a unique "actual possession" rule for Compensation Clause vesting. *Id.* at 1032.

Will did not depart from traditional vesting rules; it applied them and found only that the Adjustment Act's very different method for arriving at salary increases was too uncertain in scope and amount to vest. By contrast, the two legal prerequisites for the vesting of future interests plainly are satisfied by the 1989 Act: (1) the future owner of the right to the pay adjustment is clear and self-executing; and (2) the non-discretionary structure of the 1989 Act makes the transfer of property sufficiently certain to vest.

CONCLUSION

For these reasons, and those stated in the petition, the Court should grant the petition for rehearing en banc and overrule *Williams*.

Respectfully submitted,



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