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COURT OF APPEALS

STATE OF NEW YORK

BRANSTEN,

Respondent,

-against-

No. 67

STATE OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York
October 11, 2017

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
GUEST JUDGE MARK C. DILLON
GUEST JUDGE ROBERT C. MULVEY
GUEST JUDGE ERIN M. PERADOTTO

Appearances:

JUDITH N. VALE, ASG
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK
Attorney for Appellant
120 Broadway
New York, NY 10271

ALAN M. KLINGER, ESQ.
STROOCK & STROOCK & LAVAN LLP
Attorney for Respondent
180 Maiden Lane
New York, NY 10038

Sara Winkeljohn
Official Court Transcriber



1 JUDGE RIVERA: Last matter on for this afternoon,
2 Bransten v. State of New York.

3 Counsel.

4 MS. VALE: Your Honor, may I reserve three
5 minutes, please?

6 JUDGE RIVERA: Yes.

7 MS. VALE: May it please the court, Judith Vale
8 for the State of New York. This case is about an across-
9 the-board increase to the price of health insurance
10 premiums for all state employees who purchase plans from
11 the state. Such even-handed price increases do not violate
12 the compensation clause whether premiums rise because the
13 State decreases its percentage contribution - - -

14 JUDGE RIVERA: So - - - so let me ask you this.
15 If - - - if - if there was a twenty-five-cent reduction in
16 salary, you agree that violates the compensation clause?

17 MS. VALE: I do, Your Honor, because - - -

18 JUDGE RIVERA: Okay. So if the premium hit the -
19 - - the judiciary has to take is 1000-fold that, you say
20 that, though, is not a violation of the compensation
21 clause?

22 MS. VALE: That's correct, Your Honor. That's
23 because when it comes to salaries which are really the core
24 of the compensation clause, there is a - - - there is no de
25 minimis reduction that is constitutional. And that's



1 because it's what the core of the compensation clause is
2 about.

3 JUDGE GARCIA: So a ten percent reduction for
4 every state employee hits judges it's a violation?

5 MS. VALE: For salaries, correct. There's no - -
6 -

7 JUDGE FAHEY: Is there anything other than
8 salaries that you would consider compensation?

9 MS. VALE: Well, the history of the compensation
10 clause makes clear that salaries and permanent payments
11 that are similar to salaries, such as just giving everybody
12 5,000 dollars to go spend no matter what insurance they
13 buy, those kind of permanent payments are akin to salary.

14 JUDGE FAHEY: Well, can you point to - - - I
15 haven't gotten any check for 5,000 recently. So can you
16 point to any - - - anything particularly that you would
17 characterize that's other than a salary that would be
18 called compensation? Because it doesn't say salaries. It
19 says compensation.

20 MS. VALE: That's correct, Your Honor. Two
21 things, I mean, I - - - I think the word "compensation" was
22 used synonymously with salary throughout the history of the
23 clause.

24 JUDGE FAHEY: Okay.

25 MS. VALE: But when it comes - - - two points. I



1 think - - -

2 JUDGE FAHEY: I'm more interested in an example.

3 MS. VALE: Sure, Your Honor. Well, I'll say
4 this. I think it's - - - it's been the case for a long
5 time that not everything of value is compensation under the
6 compensation clause.

7 JUDGE GARCIA: What about pensions? What about
8 you have a non-contributory pension plan, that's your deal,
9 and now we take it away from you?

10 MS. VALE: Pensions have long been considered
11 akin to deferred salaries, so I think pensions would be an
12 example of something that is much more similar and probably
13 does count as - - -

14 JUDGE WILSON: What about the - - -

15 MS. VALE: - - - compensation.

16 JUDGE WILSON: What about the lump sum in lieu of
17 per diem in the Bockes v. Wemple case?

18 MS. VALE: The lump sums are permanent payments
19 that are akin to salaries. If - - - if the legislature
20 creates a permanent payment that goes to everyone no matter
21 what expenses they incur - - -

22 JUDGE WILSON: When you say permanent, what do
23 you mean?

24 MS. VALE: Sorry?

25 JUDGE WILSON: When you say permanent what do you



1 mean?

2 MS. VALE: It doesn't fluctuate depending on - -
3 - it doesn't fluctuate depending on the expenses that an
4 employee might incur, and this is a distinction that this
5 court withdrew - - -

6 JUDGE RIVERA: Well, originally it did. I mean
7 the - - - the per diem you're talking about is a
8 replacement of the - - - what you're calling fluctuating
9 per diem that depended on the actual expense. Isn't that
10 the history of that case?

11 MS. VALE: Well, the - - - the history of the
12 reimbursement case is that this court looked at the
13 specific features of what was going on and drew a
14 distinction between reimbursements that fluctuated
15 depending on what an employ -- a judge might incur at a
16 particular time and permanent payments - - -

17 JUDGE RIVERA: So - - - so then - - -

18 MS. VALE: - - - that didn't fluctuate. But when
19 it comes - - -

20 JUDGE RIVERA: So then - - - well, because the
21 permanency is whether or not you say so, right? I mean
22 it's whether or not it's permanent because you're never
23 going to take it away, which is a little bit of a circular
24 argument, but isn't the point of that case that it's
25 remuneration for expenses incurred?



1 MS. VALE: I don't think so, Your Honor, because
2 this court drew a distinction and said that when there are
3 reimbursements that are being given to judges after they
4 incurred the expenses and they fluctuate that those were
5 not themselves protected compensation. I - - - I think
6 when it comes to health benefits, I think it's important to
7 look at the feature that's actually being challenged here,
8 which is the percentage contribution rate of the state's
9 contribution going into the fund.

10 JUDGE FAHEY: So it's - - -

11 MS. VALE: And whether - - -

12 JUDGE FAHEY: That's a good point. I - - - just
13 let me take one step back for one second on it. It - - -
14 because Judge Garcia's point I thought was important when
15 he said pensions. I - - - I think that's correct that
16 pensions could be considered compensation, just thinking
17 out loud. But - - - and that's because the - - - the
18 linkage that we're looking for between the compensation in
19 whatever form it takes and the judges is whether or not
20 taking it away would undermine the independence of the
21 judiciary. And isn't that - - - does - - - for instance,
22 taking away a pension could actually do that. Isn't that
23 the linkage that we're looking for here?

24 MS. VALE: I do think that the core purposes of
25 the compensation clause play a key role in in this analysis



1 in that when it comes to pension, especially because it has
2 long been considered deferred salary, that diminishing,
3 yeah, that could be seen to actually - - - or at least have
4 the appearance of affecting the independence of the
5 judiciary. But price increases to premiums that apply to
6 all employees are a very different matter.

7 JUDGE GARCIA: Just to take Judge Fahey's point
8 then again back even one step further maybe, isn't the
9 analysis come down to is this a direct or an indirect
10 effect on compensation? So if it's a direct effect and
11 Judge Fahey's - - - or Judge Rivera's initial question,
12 then you don't look at whether what's the intention, are
13 you being treated differently? It's a compensation
14 violation. If it's an indirect effect then we get into
15 well, it may not have been intended as it wasn't in Social
16 Security in Hatter, but it may give the appearance of
17 calling out judges or targeting judges in a way that would
18 violate the compensation clause. So isn't one of the real
19 issues here is this a direct effect on judicial
20 compensation or indirect?

21 MS. VALE: I agree with that, Your Honor. And I
22 think to do that analysis it's important to think about
23 what is the compensation that you're referring to - - - to
24 understand if this is a direct diminishment of that
25 compensation. And I think we all agree that salaries are a



1 protected compensation.

2 JUDGE GARCIA: Right. So is this more like a
3 Medicaid tax or is it more like, you know, a pension
4 benefit, healthcare, closer to pension or is it more of the
5 pure indirect, you know, Social Security analysis, Social
6 Security tax analysis we're doing? And doesn't this really
7 kind of fall somewhere in between?

8 MS. VALE: It may not fit in a particular box,
9 but I think when it comes to talking about the effect on
10 salary, this is clearly an indirect effect on protected
11 salary. It's the same analysis that this court used in
12 Lippman. Although the protected form of compensation there
13 was retirement benefits, the idea was the same. The - - -

14 JUDGE WILSON: But if the - - - if the price of
15 the insurance policies that the State is purchasing from
16 outside companies doubles and the State says we don't want
17 to pay double, we're just going to pay the amount to these
18 companies we've been paying before, is that a compensation
19 clause violation?

20 MS. VALE: No, Your Honor. I don't think so
21 because when it comes to the prices, there are many ways
22 that the prices can increase to employees. And the effect
23 here of reducing the percentage contribution is similar to
24 the premiums - - - the premium costs in the world just
25 rising over time. The effect on judges is the same. But



1 plaintiffs concede that a year-to-year premium increase is
2 constitutional as long as it's applied to everyone, and the
3 effect here on judges is the same. When the percentage
4 contribution goes down, the effect is that the price that
5 employees pay go up - - - goes up, and it is true that some
6 money comes out of your paycheck to cover that higher cost.
7 But - - -

8 JUDGE WILSON: Well, does it matter if we know -
9 - - to know why the - - - the percentage cost went down?
10 That is if the percentage cost goes down because the State
11 says we don't want to pay as much as we've been paying,
12 does that matter? We - - - we want to reduce the amount
13 we're spending on insurance, and we're cutting it from - -
14 - we're paying 100 million dollars a year overall. We're
15 going to cut that to 50 million. Does that matter?

16 MS. VALE: I don't think it matters in the
17 constitutional analysis. Certainly, it would matter if
18 there was some evidence of intent to target judges. But
19 when the intent is clearly evenhanded, the - - - this court
20 has been very careful not to generally look at the intent
21 of the legislature except for - - - for targeting.

22 JUDGE WILSON: And that answer depends on the
23 health insurance not being compensation?

24 MS. VALE: That's correct, Your Honor. And - - -
25 and to move through the sort of boxes of - - - of what



1 compensation we could be talking about here, when it comes
2 to salary I think this is clearly an indirect effect on
3 that salary. And when it comes to health benefits, this
4 court does not need to decide here whether all aspects or
5 some conglomerate health benefit is protected compensation
6 because health benefit, they are made up of many different
7 moving pieces that change every year. It's not just the
8 premiums. It's also deductibles, copays, and the various
9 benefits that go into the plan. And the court focuses on
10 the aspect that challenged here, which is the percentage
11 contribution rate. That percentage is neither itself
12 protected compensation and reducing it shouldn't be seen as
13 a so-called direct diminishment of - - - of some aspect of
14 the health plan - - -

15 JUDGE RIVERA: So - - -

16 MS. VALE: - - - that might be protected.

17 JUDGE RIVERA: So it's not compensation because
18 you say it's not salary, which is the easy one. And it's
19 not anything else that is the functional equivalent to
20 salary. Is that where you are, or is there some other way
21 you want to explain that?

22 MS. VALE: Well, the percentage contribution
23 itself is not compensation for - - - for several reasons.
24 I mean the - - - neither the percentage or the dollar
25 amount that's actually contributed goes to judges at all.



1 And what the percentages formula really does - - - and the
2 point of a percentage formula instead of giving everybody a
3 set dollar amount is to have the State's contribution in
4 dollars fluctuate at a certain level as the underlying
5 prices go up.

6 JUDGE WILSON: To say what you're saying a
7 different way, just to make sure I understand it, if, for
8 example, the State said you're now going to have to pay a
9 greater percentage - - - or contribute a greater percentage
10 towards the policies, but we're going to remove the 10,000-
11 dollar annual deductible and make that zero, it - - - it's
12 not clear whether there's been a diminishment or not a
13 diminishment. You're saying there's a lot of things that
14 go into a policy, and so figuring out whether there is a
15 diminishment at all is not an easy thing to do?

16 MS. VALE: I agree, Your Honor. That is - - -
17 that - - - if you're thinking about health insurance as the
18 possible protected compensation, it - - - it is very
19 complicated to try to do that in some conglomerate level
20 because it's not clear that changing the percentage changes
21 the overall value of the plan, especially when benefits
22 often go up over time and actually did go up in 2011 when
23 this change was implemented.

24 JUDGE RIVERA: Well, I don't see how the - - -
25 then I'm losing you there. I don't see the benefits - - -



1 the benefit at large is the compensation because they're
2 paying for part of it, right? The judges pay for - - - the
3 employees pay for some of it. It is your share what the
4 State has decided it's going to put towards the premiums,
5 which means that they pay less. That's their point, right,
6 that the judges and all employees pay less because you're
7 paying a share. Your argument is the share - - - well, the
8 percentage stays the same but the - - - the amount changes.

9 MS. VALE: Well, I think there's - - - there's
10 two different arguments. One is when it comes to the
11 percentage formula itself it is true that even when the
12 percentage formula goes down, it is not necessarily the
13 case that the dollar amount that the State contributes also
14 goes down. In 1983, the last - - -

15 JUDGE PERADOTTO: And the reverse is also true.
16 Just - - - if the percentage went up, that doesn't
17 necessarily mean that the - - - that the cost to the
18 employee would go down.

19 MS. VALE: That's also true. I mean a lot of - -
20 - there's so many interlocking pieces here that as the
21 premiums rise, as they have been over time, lowering the
22 percentage rate what it - - - what it effectively does is
23 slow the rate at which the State - - - State's own
24 contribution is rising, but the State is not required to
25 keep pace with prices over time. That's true even in the



1 area - - - area of salaries.

2 JUDGE GARCIA: It seems hard, though, if your
3 argument is we parse a benefit to see what part of that
4 benefit is compensation. So if we went back to pensions
5 and we say it wasn't - - - you know, hypothetically, it
6 wasn't a non-contributory plan, the judge is paying 100
7 dollars a month into a pension plan and getting a defined
8 benefit, what if the State says, okay, now you're paying
9 200? So pensions you say are deferred comps so it's a part
10 of comp - - - you know, it's a part of salary. It's a
11 direct effect. But now are we going to parse that to a
12 premium type of issue or anything that affects pension
13 because it's part of salary would be a direct effect and
14 unlawful?

15 MS. VALE: I mean I do think pensions are - - -
16 could be an entirely different category that don't need to
17 be parsed because they are so connected to deferred
18 compensation and were understood that way in the history of
19 the Constitution. And pensions also have their own
20 separate protection in the New York Constitution. I think
21 health benefits are unique and - - - and they are very
22 different from the pension system.

23 JUDGE GARCIA: Aren't we then back to direct or
24 indirect and the things that you're talking about in terms
25 of parsing premium is really the analysis of Hatter and the



1 others - - - cases on - - - if we'd follow it on is this
2 direct - - - indirect impact violate the comp clause?

3 MS. VALE: I do think we're still in the direct
4 and indirect framework. But I do not think that reducing
5 the percentage contribution should be viewed as a direct
6 diminishment even of - - - of some aspect of the health
7 benefits that if the - - - if the - - - that might be
8 protected and that's because it is - - - you'd have to
9 start meting out other changes that might happen in the
10 health benefit over time in order to decide whether the
11 actual value of the plan went down. And that is a very
12 difficult analysis to do. And these types of changes
13 rising in premium - - - spikes in premiums over times,
14 changes to copays, deductibles, they happen all the time,
15 and they have never been thought to be violations of the
16 compensation clause.

17 JUDGE RIVERA: But - - - but - - but - but isn't
18 the reality that you - - - you are looking to pay less
19 because that's what you negotiated, right? The point of
20 the negotiation or - - - as I understood it your - - - the
21 State's in a fiscal crisis. They negotiate this exchange
22 along with some other benefits of reducing the
23 contributions to stave off some of the layoffs. It must
24 represent some value, real value, to the State that they're
25 saving some money which means at some point somebody's



1 picking up the difference. And in this case, it happens to
2 be employees, and of course for these plaintiffs it's
3 judges so they're claiming that's the violation of the
4 compensation clause. Am I misunderstanding the whole point
5 of - - - of that negotiation and that exchange of staving
6 off layoffs for reducing the percentage?

7 MS. VALE: Well, I don't think it - - - sure. I
8 mean it - - - it's true that these changes went into effect
9 as - - - as part of a broader plan to reduce deficits. But
10 one of the reasons why the State looked to premiums is
11 because premium costs are rising all the time for
12 everywhere, have been traditionally rising for everyone.
13 And so that motivation is not fundamentally different than
14 simply increasing the premiums year to year because
15 premiums are rising because health costs - - - healthcare
16 costs are rising, new technologies come out, new laws
17 require new coverage. There can be many reasons why
18 premiums rise, and it's not fundamentally different to
19 raise the premiums to address those rising costs even if
20 the State is - - - is need - - - has a particular need to
21 save that cost at that time because of the deficit. And -
22 - -

23 JUDGE MULVEY: You don't seem to have addressed
24 the main argument of the plaintiffs that - - - that when
25 Civil Service Law 167 was - - - was enacted, subdivision



1 (8), that the unionized employees had a - - - had a quid
2 pro quo for that in terms of a non-layoff promise and that
3 the managerial and confidential employees had - - - had at
4 least a promise that they would receive some - - - some
5 reimbursement for these amounts. Must you convince us that
6 - - - that these reductions do not affect salary in order
7 for us to - - - to get around that problem?

8 MS. VALE: Well, the - - - the non-discriminatory
9 aspect of this matters if the court decides that there is
10 an indirect - - - there might be some indirect
11 diminishment. To be constitutional, that would still need
12 to have been done evenhandedly, and it was here.
13 Everybody, all employees now - - - the unions have finished
14 their negotiations. All unions, unionized employees, non-
15 unionized, MCs, judges, are subject to the same
16 contribution percentages. And - - -

17 JUDGE PERADOTTO: And you say that's the
18 appropriate class that we should be using to measure the I
19 believe Supreme Court used all citizens of the State of New
20 York. You say the proper class is all employees of the
21 State of New York.

22 MS. VALE: That's right. This - - - and the
23 Supreme Court made that clear in Hatter that when the State
24 is - - - is acting as an employer, the only class that
25 could really be affected are employees.



1 JUDGE PERADOTTO: Employees.

2 MS. VALE: And so it wouldn't make sense to look
3 to all citizens. And that - - - that was the same - - -
4 that's what happened with the Medicare tax. All other
5 citizens had already been subject to the tax. It was only
6 the tax immunity for federal employees that mattered. And
7 here everybody is subject to the same rates. And if the
8 court wants to look at a bigger picture in terms of other
9 terms and conditions that were being negotiated at the
10 time, the bigger picture here is that judges were just as
11 well off as everybody else if not better because everybody
12 had their salaries looked at through the appropriate
13 process. For union employees that's always negotiation
14 because it's required - - -

15 JUDGE PERADOTTO: Isn't - - -

16 MS. VALE: - - - by law.

17 JUDGE PERADOTTO: And isn't the test, though,
18 whether judges have been singled out? Not whether they
19 somehow didn't get the same benefits as others?

20 MS. VALE: That's true, Your Honor. I mean the -
21 - - the focus of the analysis really should be the
22 financial burden or the financial effect at issue, and that
23 here is the percentage contribution. And that applies for
24 everyone the same.

25 JUDGE RIVERA: Okay. Thank you, counsel.



1 MS. VALE: Thank you, Your Honor.

2 JUDGE RIVERA: You want one?

3 JUDGE WILSON: If I might, I have a
4 jurisdictional issue I'd like to - - -

5 JUDGE RIVERA: Oh, yes, please. Yes. Okay.

6 JUDGE WILSON: I'm switching subjects a little
7 bit. I'm having - - - no. I'm sorry. I've got - - - I've
8 got - - -

9 JUDGE RIVERA: No. He wanted to ask one more
10 question.

11 MS. VALE: Yes.

12 JUDGE WILSON: - - - just one question for you.
13 I'm having trouble understanding how you are here on a
14 direct appeal from Supreme under 5601(b), which allows a
15 direct appeal if the only issue raised is the
16 constitutionality of a statute. But the declaratory
17 judgment you're talking an appeal from is a declaration
18 that both the statute and the regulations are
19 unconstitutional. That seems to me not to comply with the
20 statute. In addition, if you look at the statute itself,
21 the statute doesn't do anything except vest the president
22 of the commission with power. So it seems to me that the
23 real underlying declaration here is that the regulations
24 are unconstitutional, and that doesn't allow a direct
25 appeal here from Supreme. Correct me, please.



1 MS. VALE: I think there was a general
2 understanding in Supreme Court that the - - - the statute
3 here was the thing that then allowed the change in
4 regulations. And so the statute was challenged. Although
5 it's true that the regulations are what implement the
6 statute. And this is an appeal both from the - - - I mean
7 there - - - at this point there's also a judgment and this
8 is a direct appeal on a purely constitutional issue of law.
9 I think it does center around the statute that was passed.
10 Although that gave authority to create the regulation, that
11 was really implementing the legislature's - - - the
12 statutory authority that the civil service was given. And
13 - - - and I guess another way to look at it is as I
14 understand what plaintiffs are looking for is a declaration
15 that would say that the State could never change the
16 percentage calculation. And that would - - - that kind of
17 statute would always be unconstitutional.

18 JUDGE RIVERA: Thank you, counsel.

19 MR. KLINGER: May it please the court, Alan
20 Klinger from Stroock & Stroock & Lavan with my colleague,
21 Dina Kolker, for the listed named judges and the state and
22 city associations. I'd like to start - - -

23 JUDGE RIVERA: Well, let - - - let me ask you
24 this. So as - - - as I read your briefs, and you'll
25 correct me, your - - - your position is that compensation



1 includes wages and includes benefits and it includes this
2 particular contribution that we're talking about because
3 compensation includes anything of value that an employer
4 provides. Am I misunderstanding your position on that?

5 MR. KLINGER: You are not misunderstanding, Your
6 Honor. And if the - - -

7 JUDGE RIVERA: So if that's the case, then where
8 do we draw the line? Because compensation must mean
9 something, otherwise it means anything and everything and
10 we have no way to measure the - - - the parameters of the
11 compensation clause.

12 MR. KLINGER: Yeah. Your Honor, so, yes. That
13 was what I was going to respond to your question that the
14 way - - - what's at issue here are health benefits. And
15 health benefits are really akin to pension in terms of both
16 being viewed as deferred compensation. And if you look at
17 the history of how the health benefits developed which is
18 presented in the State's brief, is that employer-given
19 health benefits grew out of the wage controls from World
20 War II. When employers couldn't increase wages because of
21 the bar on that what they did instead is they came up with
22 a new benefit to enhance the compensation package which was
23 for the employer to provide health benefits.

24 JUDGE PERADOTTO: But they're not deferred. You
25 said they were akin to - - - I mean pension I think we can



1 probably agree is akin to a deferred salary benefit. But -
2 - - but health benefits are not deferred. That's an
3 immediate benefit that's provided to the employee.

4 MR. KLINGER: But - - - no. That's right. So
5 for active employees your health benefits is a form of
6 current wage. If you look in bargaining - - - and that's
7 why we cited some of the PERB cases - - - and we understand
8 the Taylor Law analysis is not the same thing as the
9 compensation clause. But it's instructive, we believe.
10 And if you look, the cases are legion out of PERB that
11 health benefits is part of what is a term - - - essential
12 term and condition of employment, and over the - - -

13 JUDGE RIVERA: Well, we're talking about the
14 compensation clause which has a historical context.

15 MR. KLINGER: Right.

16 JUDGE RIVERA: So historically, certainly, in the
17 1800s you're not suggesting that the drafters thought that
18 the - - - when they used the term compensation they would
19 be referring to something that didn't even exist at that
20 time?

21 MR. KLINGER: No. That's right, Your Honor. It
22 didn't exist. Employers weren't providing health benefits.

23 JUDGE RIVERA: So - - - so is it our task to see
24 if whether or not this is akin to what would have been
25 compensation at the time of the drafting?



1 MR. KLINGER: No, Your Honor. Because in 1961
2 there was the state constitution. It kept the term
3 compensation. There were discussions, and this is in the
4 record, about sometimes the counsel mentions salaries the
5 same thing as compensation. Salary is not the same thing
6 as compensation, and there were decisions out in the - - -
7 before 1961 that were applying compensation more broadly.

8 JUDGE PERADOTTO: Yeah. But not - - - not in the
9 - - - not - - - those decisions were not interpreting the
10 compensation clause. You're - - - the decisions you refer
11 to were in the context to collect - - - employment cases,
12 collective bargaining.

13 MR. KLINGER: Yes. But, Your Honor - - - but
14 that - - - as people bargain - - - and if you look at it
15 that's exactly what happened here in the challenged action
16 is that here it was the reverse. In order to save jobs,
17 not have layoffs, they agreed to a reduction - - - they
18 agreed to actually pay more for healthcare because I think
19 that the State has artfully presented it. If you look at
20 what really is happening, judges are paying more for the
21 same benefit that they have previously. And - - -

22 JUDGE WILSON: So - - - so let's assume for a
23 moment that it is compensation, just for the purpose of
24 this question. I read Maron to say that the compensation
25 clause does not require the legislature to adjust salaries



1 upward to account for inflation. That's salaries, right.
2 With me so far?

3 MR. KLINGER: Yes, Your Honor.

4 JUDGE WILSON: And you agree with that?

5 MR. KLINGER: Yes. I do because - - -

6 JUDGE WILSON: Okay. Hold on.

7 MR. KLINGER: Okay.

8 JUDGE WILSON: So and then if we say that health
9 benefits are just like salary but the price of purchasing
10 the health benefits goes up, why doesn't Maron control
11 this?

12 MR. KLINGER: Because - - - because, Your Honor,
13 what we're asking for here - - - and this is why I think
14 the State is overcomplicating what's before you when it
15 speaks about parsing, we are not - - - the State - - - the
16 plaintiffs here are not saying that the copays and all
17 these parts of the plan program like what drugs are covered
18 and not covered has nothing to do with our claim. What our
19 claim here - - - and the reason it is different from Maron,
20 Your Honor - - - is in Maron there were outside forces,
21 inflation, that was argued by the judges there that needed
22 to be raised in order to stay with the marketplace.

23 JUDGE PERADOTTO: Is it - - -

24 JUDGE WILSON: Suppose - - - suppose it turns - -
25 - I'm sorry.



1 JUDGE PERADOTTO: Oh, go ahead.

2 JUDGE WILSON: Suppose it turns out, as a factual
3 matter, that the cost to the State overall of purchasing
4 insurance for judges is higher now than it was last year
5 and the State is willing to pay exactly the same
6 contribution towards that, not more. Why is that a
7 compensation clause violation?

8 MR. KLINGER: I don't think it is, Your Honor.
9 What we're saying is that the offense here - - - and this
10 is why we believe it's different than Maron - - - is there
11 was an affirmative legislative act taken to force judges to
12 pay more for the same benefit without getting anything for
13 it.

14 JUDGE PERADOTTO: Does it matter - - -

15 MR. KLINGER: That is - - - that is the
16 difference from Maron.

17 JUDGE WILSON: That doesn't speak to what the
18 State is paying, right?

19 MR. KLINGER: No. If the State - - -

20 JUDGE WILSON: There's no evidence in the record
21 about whether the State is paying more, the same, or less.

22 MR. KLINGER: Your Honor, we're - - - we're
23 indifferent. We're not here saying - - - we're saying that
24 we can't be - - - under the compensation clause we can't be
25 forced to pay more for the same benefit without getting



1 something from it.

2 JUDGE RIVERA: There's a - - -

3 MR. KLINGER: Even when you go to the - - -

4 JUDGE RIVERA: There's a legislative action that
5 results in you having to carry a larger share of these
6 costs and that comes out of the pockets of the judges - - -

7 MR. KLINGER: Precisely, Your Honor.

8 JUDGE RIVERA: Correct. Okay. So let me - - -
9 let me try something else with you, and let me go back to
10 some - - - a line of questions that - - - that were
11 presented to - - - to the State. Explain how what you've
12 just described puts in jeopardy the independence of the
13 judiciary because that's the purpose of the compensation
14 clause.

15 MR. KLINGER: Well, the purpose, Your Honor, is
16 two-fold.

17 JUDGE RIVERA: Um-hmm.

18 MR. KLINGER: The first is - - -

19 JUDGE RIVERA: Yes.

20 MR. KLINGER: - - - to protect the independence
21 of the judiciary. There's the famous Hamilton quote that
22 I'm going to butcher that says about that the power of
23 men's will is the power over their subsistence, so that's
24 part. And two, the second part, which has been both in the
25 Supreme Court and the New York courts is that for judges to



1 feel comfortable when they take judicial employment that
2 they are going - - - if they're foregoing the higher
3 compensation sometimes in private practice that they'll
4 feel comfortable.

5 MR. KLINGER: Yes. I see - - - yes. That is
6 true. You are correct that that is another purpose that
7 has been identified. The only difficulty I have with this
8 particular argument as it - - - this is an optional plan.
9 Excuse me. And the compensation clause is again - - - it's
10 very clear from the cases - - - about what is subsistence,
11 right, about your salary. There may be other amounts that
12 rise to the level and are put on the same footing with
13 salary, but it's not every possible benefit that the
14 government provides that without it a judge would have to
15 pay some amount of money to get that benefit.

16 MR. KLINGER: We agree, Your Honor. Your Honor,
17 we're not talking about if they charge more money in the
18 cafeteria.

19 JUDGE RIVERA: Yeah. But you have to - - - okay.

20 MR. KLINGER: Those type of thing. But to get
21 back to your primary question about judicial independence -
22 - -

23 JUDGE RIVERA: Well, I want to get to - - - you -
24 - - you gave me a different purpose and my response to you
25 was it's an optional plan. I'm not - - - I'm not - - - I



1 find it difficult to wrap my brain around an argument
2 that's basically saying no one will apply to be a judge if
3 the State reduces its contribution towards - - -

4 MR. KLINGER: Okay. But Your Honor - - - sorry.

5 JUDGE RIVERA: - - - premiums that are part of an
6 optional healthcare plan that - - - granted the State
7 subsidizes. You're absolutely correct about that.

8 MR. KLINGER: Yeah. But, Your Honor, under your
9 - - - under the theory that's been espoused by the State
10 and I believe your positing here, under that same theory
11 the State could just eliminate healthcare coverage for
12 judges and where would the - - - where would the violation
13 be there? So that's - - - that's - - -

14 JUDGE PERADOTTO: It - - - it could not eliminate
15 healthcare for judges alone because that would be a
16 discriminatory - - - that would be discriminatory
17 legislation.

18 MR. KLINGER: I want to get back - - - I will get
19 back to that, Your Honor, I promise. But the one thing I
20 want to say here in terms of the reason why we're not
21 saying the copays and all those other things - - - we're
22 not arguing that those were a value that has to be
23 protected. We're saying what's at issue is the - - - the
24 provision of healthcare coverage. That's what's at issue -
25 - -



1 JUDGE RIVERA: But all - - - all you're saying is
 2 that something that a judge - - - even in - - - even if it
 3 was the entire core of judges, that find of some value to
 4 them that the State can't reduce in any shape or form or
 5 otherwise take away - - - and before we get to whether or
 6 not that's discriminatory because it's targeting judges,
 7 it's not explaining to me how it's compensation within the
 8 - - - within the context, that constitutional context of
 9 what the compensation clause was drafted to address, the
 10 evil that it was drafted - - - drafted to address which is
 11 coercion.

12 MR. KLINGER: The - - - Your Honor, where it is -
 13 - - I mean why in the case Bockes v. Wemple that was
 14 mentioned earlier, you can make the same argument there but
 15 this court said that no, that is protected instead of we're
 16 going to have essentially a stipend instead of the
 17 reimbursement of expenses. You can make the same argument
 18 there.

19 JUDGE FAHEY: Yeah. But - - - but Judge Rivera's
 20 point goes to Judge Peradotto's point. You should really
 21 address that.

22 MR. KLINGER: The - - - I'm sorry. The - - - the
 23 optionality is one - - -

24 JUDGE FAHEY: Right. But I think that the - - -
 25 the exclusive effect on judges would be a requirement to



1 show that a change in benefits undermines a judiciary.

2 MR. KLINGER: No. I think what - - - what it is
3 is that it could be cumulative, Your Honor, and it's not -
4 - - so that - - - so here this is - - -

5 JUDGE PERADOTTO: Then how - - - how - - - I
6 guess I'm having a hard time seeing how is this legislation
7 any different than what the State has done year after year
8 and that is just to increase the cost?

9 MR. KLINGER: Your Honor - - -

10 JUDGE PERADOTTO: I mean every year I get a
11 notice saying it's going to cost you twenty-five dollars
12 more or whatever for - - - for the coverage.

13 MR. KLINGER: No. Because - - -

14 JUDGE PERADOTTO: How's that any different?

15 MR. KLINGER: That part is not different and
16 we're not protesting that part. If the coverage ends up
17 costing more money because that's the best deal the State
18 could negotiate with the external market we're not
19 complaining about that. We're saying we shouldn't have to
20 - - - the - - - what we're complaining about is being told
21 that the State is going to pay less of a contribution to it
22 so we have to be paying more.

23 JUDGE PERADOTTO: Well, what you're complaining
24 about is that the judges have to contribute more out of
25 their pocket. There's a difference.



1 MR. KLINGER: Yes. But it's - - - but it's
2 because of - - -

3 JUDGE RIVERA: But otherwise it's meaningless.
4 Your - - - your point is judges are paying more which means
5 that they take a hit on their salary. Otherwise there's no
6 argument on your side that that violates the compensation
7 clause.

8 MR. KLINGER: No. That's right, Your Honor. But
9 what we're - - - we're complaining about here is not
10 external market forces. We're complaining about the State
11 having made an affirmative action that they're going to
12 contribute less. They're going to change it from either
13 the 100 percent to 90 percent.

14 JUDGE RIVERA: But how is that different from
15 external forces that put in jeopardy the jobs of employees,
16 right? They're trying - - - they say it's - - - part of
17 it's a fiscal crisis and they're trying to address the
18 possible layoffs.

19 MR. KLINGER: And - - -

20 JUDGE RIVERA: They're trying to avoid that.
21 That's what they're negotiating. Why - - - why are those
22 not acceptable or proper external forces for the State to
23 consider in this analysis?

24 MR. KLINGER: They're appropriate for the other
25 state employees not for judges. The theme of the State's



1 papers is really that judges are employees and should be
2 treated the same way. You are not. You are constitutional
3 officers. You have the - - -

4 JUDGE GARCIA: But you're treated the same way
5 for tax, right? It's not that you're not treated the same
6 way. I mean they could tax you. There's a Medicare tax,
7 right?

8 MR. KLINGER: Right. So the - - -

9 JUDGE GARCIA: So it's not that you get special
10 treatment and now there's a new tax but we're judges, we
11 don't - - - we're not subject to that because we - - - we
12 get less take-home pay.

13 MR. KLINGER: So this - - - right. And this
14 moves to the Hatter analysis of direct versus indirect. So
15 just so we're clear, if it's direct the ballgame is over.

16 JUDGE GARCIA: Right.

17 MR. KLINGER: Okay. And then the one thing - - -
18 just if I can quickly say - - -

19 JUDGE RIVERA: But yeah. But under that
20 analysis, right, they could just give the benefits to State
21 employees but not to judicial officers, right? Which I
22 don't think you mean that.

23 MR. KLINGER: No. But - - - no.

24 JUDGE RIVERA: Right.

25 MR. KLINGER: No. But here, Your Honor, if - - -



1 if you were to accept that health coverage is an essential
2 benefit, not a secondary or tertiary one - - -

3 JUDGE GARCIA: It's compensation.

4 MR. KLINGER: - - - then it's compensation.

5 MR. KLINGER: Then if we have to pay more under
6 Hatter and other cases - - -

7 JUDGE GARCIA: Your time's out - - - so let's go
8 to - - - what's your best argument that if this is an
9 indirect effect on compensation that you prevail under the
10 Hatter analysis if we use that analysis?

11 MR. KLINGER: Okay. Is that, Your Honor, there
12 were four factors that Hatter put out - - -

13 JUDGE GARCIA: Right.

14 MR. KLINGER: - - - you know, in - - - in terms
15 of this. And if you look at the - - - and if you look at
16 those factors that they said that there - - - is there a
17 cost to the judges? Yes. There's a cost to the judges
18 here. It's - - - and it's, you know, the amount that's in
19 the brief. It's individual. It - - - it's multiples,
20 probably of three-and-a-half if it's for family. So there
21 is a cost to the judges for that. Then - - - then they say
22 - - - and we accept here for purposes of this argument that
23 State employees is the proper comparator. Medicare - - -
24 one of the reasons why I think the trial level judge said
25 what she did was that in - - - Medicare applied to all



1 citizens who was the government as sovereign there. Social
2 Security is different because there what happened is you
3 weren't being treated all the same. There was ninety-six
4 percent of the federal employees could opt out of the
5 Social Security. That left a relatively small group that
6 couldn't.

7 JUDGE GARCIA: Right.

8 MR. KLINGER: You know, and that - - - and of
9 that group, they said that those that had the contributory
10 plan also didn't have in effect, the judges and some few
11 others, were the people that actually had a - - - now they
12 had to make a payment and they got no benefit from it.

13 JUDGE PERADOTTO: [Indecipherable.]

14 JUDGE GARCIA: Carve out this four percent, which
15 is the sub-class of all federal employees that were in this
16 different class but then they did something else and they
17 targeted specifically at judges, they carved out some type
18 of pension plans that would qualify, essentially, as Social
19 Security payments and everybody else had to contribute to
20 Social Security. Everybody else in that four percent class
21 were mainly judges and the President of the United States,
22 I think. So that - - -

23 MR. KLINGER: And a few - - - and a few others,
24 Your Honor.

25 JUDGE GARCIA: Right. The Vice President. So



1 that was the problem it seemed to me with Hatter, and you
2 don't have that here.

3 MR. KLINGER: We think - - - we submit that we
4 do, Your Honor, because what we had here is that one, we
5 had no option, judges had no option you can't collectively
6 bargain. This was imposed on the judges. The State
7 employees as the unionized employees that we went through
8 received the - - - you know, layoff protection and some
9 other things. The managerial and confidential employee
10 group as was - - - they received something for this.

11 JUDGE GARCIA: But the problem it seems to me
12 with the Social Security tax in Hatter wasn't that a
13 bargained-for consideration problem, it was that Congress
14 then targeted the judges saying well, you have this great
15 deal, so you're going to be carved out into this separate
16 class because your pension plan is different. So where I
17 think the term they used was "equalizing things". We're
18 equalizing things to the judges. That's not what happened
19 here?

20 MR. KLINGER: Well, you - - -

21 JUDGE GARCIA: They weren't equalizing because
22 you couldn't be fired, right?

23 MR. KLINGER: Right. That was - - - that was
24 something that the judges already had. But here the danger
25 here - - - and I think it harkens back to why we have the



1 compensation clause protection for judges - - - the dangers
2 here is that if you don't provide this protection for
3 judges they are going to susceptible to these matters. The
4 law is clear that you don't have to have an evil intent - -
5 - intent. That it can be - - -

6 JUDGE GARCIA: But without the evil intent you
7 have to have some appearance that judges are being
8 targeted, and I think that's where I'm struggling here a
9 little bit.

10 MR. KLINGER: Well, the - - - here - you - not
11 that you have necessarily - - - I think it's worse than
12 appearance, Your Honor. Judges were treated differently.
13 Judges got nothing for this. They got no benefit.

14 JUDGE MULVEY: Managerial people didn't, either.

15 MR. KLINGER: I'm sorry, Your Honor?

16 JUDGE MULVEY: In the end, the managerial people
17 and confidential people didn't either.

18 MR. KLINGER: But the - - - but in the end the
19 managerial and confidential people one, got the promise of
20 the lump sum payments, which may come to them later on.
21 They also got increases in - - -

22 JUDGE RIVERA: Well, of course, the - - -

23 MR. KLINGER: - - - increases in salary.

24 JUDGE RIVERA: - - - the unionized people who
25 don't participate didn't get anything either, right? And



1 the judges who don't participate in this plan maybe have a
2 partner's plan that they're participating or someone else's
3 plan. They're - - - they're not taking the hit so - - -

4 MR. KLINGER: Well, but - - - but I think but if
5 you stay on that point, Your Honor - - - and this is what
6 I'm trying to say before when you were questioning whether
7 this really should be looked at as wages - - - and this is
8 in the record page -

9 JUDGE RIVERA: Well, it's compensation.

10 MR. KLINGER: Okay. I'm sorry. It's - - -

11 JUDGE RIVERA: Salary.

12 MR. KLINGER: Well, akin to salary because on the
13 record if you were to look at pages 190 and page 109, page
14 190 is an OCA memo to the judges when this happened where
15 the judges were told that if they opt out of the healthcare
16 they will get a lump sum payment. And then if you look at
17 pages 109 of the record, it makes clear from the health
18 system that that lump sum payment is going to be taxable to
19 them as income. That is, why Your Honors, we're saying
20 that we feel that we fall within the - - - the first part
21 because - - - and by the way, Your Honor, they only let you
22 opt out if you show them that you have alternative
23 coverage. That is - - - that is in the record on pages 190
24 and 109. If this wasn't to be viewed as akin to salary,
25 why if you opted would they be providing you with cash and



1 they're telling you that it's taxable as income?

2 JUDGE GARCIA: Counsel, just to be clear, the law
3 - - - before this and now you're not arguing that this
4 court doesn't have jurisdiction to hear a direct appeal,
5 are you?

6 MR. KLINGER: We are not, Your Honor.

7 JUDGE RIVERA: Okay. Thank you, counsel.

8 MS. VALE: I'd like to make - - -

9 JUDGE RIVERA: So - - - so is there a category of
10 essential benefits that should be on the same footing as
11 salary for purposes of the compensation clause?

12 MS. VALE: There might be. And this court
13 doesn't have to decide that question because I think it is
14 important to look at what's being challenged here because
15 with coverage, health benefit coverage, is not being
16 challenged here. Employees still get health benefit
17 coverage. They actually get better coverage than they did
18 before the changes in 2011. What's being challenged here
19 is the percentage contribution rate, and that is not itself
20 direct compensation and it should not be viewed as a direct
21 diminishment. It should not be in that box.

22 JUDGE GARCIA: Doesn't that bring you back to
23 what if you change the percentage contribution for a
24 pension plan? If the pension plan's considered
25 compensation, arguably it's bad. If it's not, then you get



1 into a different analysis. So is it - - - is it really so
2 much what they're changing, or is it first whether or not
3 this is compensation or isn't it?

4 MS. VALE: There is a threshold - - - there is a
5 threshold determination of what compensation are we talking
6 about and is this it. And I just don't think the court has
7 to decide in this case whether there might be some aspect
8 of health benefit coverage that is so great that it could
9 be considered compensation because - - -

10 JUDGE PERADOTTO: So your - - - so your point is
11 if even if - - - even if the analysis that this - - - that
12 this is an indirect hit on the judges it still is non-
13 discriminatory so your - - - that's why you say we don't
14 have to get to that issue?

15 MS. VALE: Well, as long as - - - as long as you
16 decide that this is an indirect hit to either the salary or
17 some form of health benefit compensation if you thought
18 that existed then you do have to decide that it's non-
19 discriminatory, and I'd like to get to that point. I think
20 looking at the who negotiated and who didn't and who had
21 what other terms and conditions at the same time
22 fundamentally misconstrues the analysis because negotiating
23 who can negotiate and who has other terms and conditions is
24 controlled by the Constitution and it's controlled by other
25 statutes like the Taylor Law. And if you look - - - if you



1 want to look at the big picture and not just the actual
2 financial issue, in the big picture everybody's salaries
3 went through the same - - - the correct and appropriate
4 process. For unions, that's negotiation. For judges,
5 that's the committee on - - - on compensation. And for MC
6 employees that's a combination of legislative action and
7 budgetary discretion. Everyone got the appropriate
8 process. That's how you should be comparing them. You
9 can't look at who is negotiating or not because unionized
10 employees always negotiate with the State and judges never
11 negotiated with the State.

12 JUDGE GARCIA: Just to go back to one point here.
13 So if this we say isn't a direct effect, this isn't
14 compensation, do you agree then it is an indirect effect on
15 compensation?

16 MS. VALE: It is an indirect effect on salary for
17 - - - for sure. I think we can agree with that. And it is
18 a non-discriminatory indirect effect on salary. And the
19 idea that judges paid more to get nothing I think is just
20 fundamentally incorrect. You have to look at the fact that
21 judges still got health benefits at the end of the day.
22 They got different benefits, better benefits, than pre-
23 change. And at the end of the day, there were a lot of
24 other things on the table that unionized and MC employees
25 lost out on. There were salary reductions, furloughs, MC



1 employees got hit with salary deficit reduction plan.
2 Judges in the end, they had those protections not because
3 there was discriminatory treatment in terms of the 2011 law
4 but because they have constitutional protections to begin
5 with.

6 JUDGE GARCIA: But doesn't that get a little bit
7 into equalizing? They had these other benefits so you
8 should take this hit on your contribution then?

9 MS. VALE: No, Your Honor. This is - - - this is
10 very different from what happened in the Social Security
11 tax in Hatter. The upshot in Hatter was that judges were
12 pretty much the only employees who did not have an
13 individual option to just choose not to - - - to pay the
14 tax at all. That - - - and they - - - and the government
15 tried to justify that by saying oh, the judges actually
16 have a protected retirement benefit and we're specifically
17 trying to make up for that protected benefit. That - - -
18 that is nothing like what's going on here. No employee has
19 an individual option to not pay the higher percentage
20 rates. There were unionized bargaining and once the unions
21 reached a deal everybody has to pay. There's no individual
22 choice. And nobody was trying to offset some protection
23 that judges already had. They're being treated the same as
24 everyone to begin with.

25 JUDGE RIVERA: Can you - - - can you comment on



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his point about the lump sum?

MS. VALE: The opt out payment?

JUDGE RIVERA: Yes.

MS. VALE: Yes. Well, the opt out payment is something different. It's not being challenged here. The opt out payment actually has more characteristics to the kind - - - to a salary than the percentage contribution because it is paid directly to judges and goes right into their pocket - - - pocketbooks. But the opt - - - one thing I'd like to emphasize is the opt out payment is not connected to the price of premiums, really. The opt out payment is much, much lower than the cost of premiums, and - - - and what it is is a separate incentive program to try to get people to not take the State's insurance to begin with.

JUDGE RIVERA: Thank you.

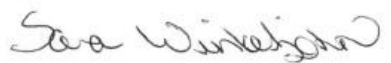
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Bransten v. State of New York, No. 67 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: October 17, 2017

