No. 13-607C
Judge Bruggink

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BARBARA J. HOUSER, DAVID S. KENNEDY, ELIZABETH L. PERRIS, EUGENE R. WEDOFF, CHARLES G. CASE II, DAVID W. HOUSTON III, THOMAS SMALL, PHILIP H. BRANDT, JAMES M. MARLAR, ROBERT D. MARTIN, AND ROGER DREHER, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 1987, Congress responded to a crisis facing the bankruptcy courts. Although bankruptcy judges had historically received roughly 90% of district judges' salaries, they had just seen their salaries drop sharply relative to district judges—to 81%. That disparity threatened to exacerbate an already alarming trend: Despite the increasing need for their expertise, bankruptcy judges were resigning in droves. A report on the crisis recommended that Congress "restore[] the parity that has historically existed between the salaries of district and bankruptcy judges." Congress did just that, guaranteeing bankruptcy judges salaries "equal to 92%" of district judges' salaries. That statute mandates an important policy of parity between the two salaries—parity not in their total amounts but in their rate of increase, including cost-of-living adjustments (COLAs).

Congress understood that linking the salaries in this way meant bankruptcy judges would receive any COLAs received by district judges, even those initially denied in violation of the Compensation Clause. Just a few years earlier, all three branches agreed that such COLA denials did not trump the parity mandated by a statutory linkage to district judges' salaries. As a Comptroller General's opinion explained, it is inappropriate to "undo that linkage in the absence of a clear congressional intent to repeal" it.

But that is exactly what the government now proposes. The government's approach would return us to the very disparities Congress sought to end: As in the 1980s, bankruptcy judges would see their salaries drop sharply relative to district judges—to 81%—and be treated differently with respect to COLA denials. Worse, the statute that Congress enacted to ensure parity would be used to permanently destroy it. That incongruous result cannot be squared with the statute's plain meaning, let alone its purpose or history.

MOTION FOR SUMMARY JUDGMENT

The plaintiffs—current, retired, and recalled bankruptcy judges, and the surviving spouse of a bankruptcy judge—respectfully request summary judgment in their favor under this Court's Rule 56 because there is "no genuine dispute as to any material fact" and because they are "entitled to judgment as a matter of law." RCFC 56(a). This motion presents arguments identical to those in our amicus brief in *Cornish v. United States*, 12-cv-861, and responds to the government's motion in that case. Our motion addresses liability only; we request that damages issues be deferred until after additional briefing.

ISSUES PRESENTED

1. Bankruptcy judges are entitled under 28 U.S.C. § 153(a) to receive a "salary at an annual rate that is equal to 92 percent of the salary of a judge of the district court of the United States as determined pursuant to section 135," which sets the total salary of district judges including COLAs. Under *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012) (en banc), district judges are entitled to COLAs denied to them in certain years. Are bankruptcy judges entitled to receive compensation equal to 92% of the district-judge salary for those years, including the unlawfully denied COLAs?

2. Does the blocking legislation enacted in 1995, 1996, 1997, and 1999—which neither mentions bankruptcy judges nor applies to them directly—require that bankruptcy judges receive an amount other than 92 percent of the district-judge salary for those years, including the COLAs to which district judges are entitled under *Beer*?

BACKGROUND

In this case, more than most, past is prologue. The statute at issue, 28 U.S.C. § 153(a)—which guarantees each bankruptcy judge a salary "equal to 92 percent" of a district judge's salary—is the culmination of a decade-long effort to define bankruptcy

judges' status relative to their Article III peers. It embodies a strong congressional policy of parity—a direct response to a sharp drop in bankruptcy-judge salaries in the late 1980s and the inequitable treatment of bankruptcy judges with respect to COLAs. And it was enacted against the backdrop of a widely shared understanding that the COLA denials found unconstitutional as to Article III judges in *United States v. Will*, 449 U.S. 200 (1980), did not apply to Article I judges whose salaries were linked to those of Article III judges. The question faced by this Court, therefore, is not a new one. Once again—this time in the wake of *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012) (en banc)—the question is whether COLA denials found unconstitutional as to Article III judges should nevertheless be applied to defeat Congress's policy of parity.

A. Bankruptcy Reform Culminates in a Strong Congressional Policy of Parity Between Bankruptcy-Judge and District-Judge Salaries

For much of the twentieth century, bankruptcy matters were administered by "referees" appointed by district courts. *See* 11 U.S.C. § 62(a) (1976). Over time, these referees took on an increasingly judicial role and district judges "removed themselves further and further from the consideration of bankruptcy matters," which became too "specialized and require[d] too much expertise to be able to be handled on an ad hoc basis by a generalist." H.R. Rep. No. 95-595, at 9, *reprinted in* 1978 U.S.C.C.A.N. 5963, 5968-71 (1977). By the 1970s, the urgent need to attract and retain qualified judges with bankruptcy expertise prompted an intense debate over whether to grant Article III status to bankruptcy judges. *See* Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978,* 81 Am. Bankr. L.J. 1 (2007); David Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law in America* 136-47 (2001). Although Congress decided against Article III status in a last-minute compromise, the 1978 Bankruptcy Reform Act

nevertheless established United States Bankruptcy Courts in each federal judicial district and made them courts of record, with their own clerks and other staff, and broad jurisdiction over bankruptcy matters. Pub. L. No. 95-598, 92 Stat. 2549 (1978).[1]

1. The First Bankruptcy-Judge Compensation Scheme Fails. Having established the new system of courts, Congress faced the question of how to compensate bankruptcy judges to reflect their newly enhanced status. Congress's first attempt was a failure. The 1978 Act set their salaries at $50,000, subject to the existing COLA framework for federal judges.[2] That framework—set by the Federal Salary Act and the Executive Salary Cost-of-Living Adjustment Act—provided annual COLAs and required the creation of a Quadrennial Commission to conduct a comprehensive review of compensation levels every four years. 2 U.S.C. §§ 351-61 (1976). The Commission's recommendations were submitted to the President, who in turn recommended to Congress a set of revised salary levels that would become law unless Congress disapproved them within 30 days. *Id.*

The problem with this system for setting bankruptcy judges' pay was threefold: *First*, as chronicled in a report to the Commission prepared by Ken Feinberg in 1986, their initial salary was inadvertently set too low as a result of "a quirk in the legislative process." Report to Commission on Executive, Legislative, and Judicial Salaries, *Promises*

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[1] After the Supreme Court struck down the 1978 Act's jurisdictional provision because it vested too much independent adjudicative authority in judges lacking Article III's tenure and compensation protections, *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Congress responded by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984, which refined the jurisdictional grant and several other aspects of the 1978 Act. Pub. L. No. 98-353, 98 Stat. 333 (1984). Bankruptcy judges' compensation was left unchanged.

[2] Pub. L. No. 95-598, tit. II, § 201(a), 92 Stat. 2658 (1978) (codified at 28 U.S.C. § 154).

Made, Promises Still Unkept, Vol. III, 6 (Nov. 1986) (attached as Appendix D) ("Feinberg Report"). *Second*, bankruptcy judges were paid less than their official salaries for several years because they were in practice denied COLAs by Congress.[3] This occurred even when other federal judges—both Article I and Article III—received COLAs (as discussed in Part B below). *Third*, the quadrennial review process did not remedy these problems; it made them worse. In 1986, district judges received a salary of $81,100 and bankruptcy judges received $70,500—roughly 87% of a district judge's salary. The Commission recommended reducing that disparity while increasing both amounts significantly, so that district judges would receive $130,000 while bankruptcy judges would receive $120,000—roughly 92% of a district judge's salary.

But rather than bring the two salaries closer together, the President's recommendation moved them further apart. In a January 1987 letter to Congress, the President acknowledged that the Commission had determined pay increases were necessary to combat judicial "recruitment and retention problems."[4] He did "not believe it would be appropriate," however, "to fully implement the Quad Commission's recommendations at this time," and instead "cut substantially" its recommended pay increases and proposed a salary of $72,500 for bankruptcy judges—only 81% of the proposed salary for district judges ($89,500). *Id.* at 1967-69. The Senate passed a resolution disapproving these recommendations within 30 days, as required to prevent them from becoming law. *See* 11 U.S. Op. Off. Legal Counsel 18, 19 (Feb. 9, 1986) (citing

[3] *See* Exec. Order No. 12165, 44 Fed. Reg. 58,671 (1979), *as amended by* Exec. Order No. 12200, 45 Fed. Reg. 16,443 (1980) (FY 1980); Exec. Order No. 12248, 45 Fed. Reg. 69,199 (1980) (FY 1981); Exec. Order No. 12330, 46 Fed. Reg. 50,921 (1981) (FY 1982); Exec. Order No. 12387, 44 Fed. Reg. 58,671 (1982) (FY 1983).

[4] Recommendations of the President, *Recommendations for Executive, Legislative, and Judicial Salaries*, 52 Fed. Reg. 4,125, 101 Stat. 1967, 1967 (Jan. 5, 1987).

H.R.J. Res. 102). But because the House did not pass its resolution until one day after the 30-day period expired, "Congress'[s] action disapproving the raise" was "ineffective," and the new salaries took effect in March 1987. *Id.*

Soon after the 30-day period lapsed, the Congressional Research Service concluded that once the President's pay recommendations "go into effect in March, the salaries of Bankruptcy Judges will be approximately 81 percent of those of the Judges of the U.S. District Court"—outside the traditional range of "86 to almost 92 percent." *Salaries of Bankruptcy Judges, Special Trial Judges of the U.S. Tax Court, and U.S. Attorneys* 1-2 (Feb. 19, 1987) (attached as Appendix C) ("CRS Memorandum"). The Research Service was "unable to find any written justification for the increased differential." *Id.* at 2. The General Counsel of the Administrative Office of the U.S. Courts reported "that historically the relationship [between bankruptcy judges and district judges] has been recognized at around 90 percent," and he had "not been able to determine why there was this dramatic change." *Id.* He explained that "the Judicial Conference has argued that the rates for the Bankruptcy Judges are too low in relation to the District Court Judges," and "said that the Conference may ask for Congressional action to reestablish rates somewhat closer to the 90 percent relationship." *Id.*

2. Congress Considers Linking Bankruptcy- and District-Judge Pay. Within months, legislation was proposed that would do just that: Section 153(a) would be amended to set each bankruptcy judge's "salary at an annual rate that is equal to 92 percent of the salary of a judge of the district court of the United States as determined pursuant to section 135" (which determines district-judges salaries, including COLAs).

As Congress was considering this proposal, the crisis in the bankruptcy courts received sustained national attention. The Los Angeles Times reported on how "the poor

salary and benefits" of bankruptcy judges made "recruitment difficult."[5] For example, "[t]he leading candidate for the sole new judgeship in [one] jurisdiction withdrew his name" after the President "gutted a proposal to give the bench another raise," leaving "a 35-year-old lawyer with no experience as a private practitioner" as the "most likely No. 1 candidate." *Id.* One former bankruptcy judge complained to the New York Times: "The number of bankruptcy judges who resigned from the court in the last three years is more than double the number of those of us who left the bench in the 1970's and early 80's combined. I know. I am … chairman of what I regret to say is one of the fastest growing legal organizations in the country, the Association of Former Bankruptcy Judges."[6] The Chicago Tribune noted that these judges were "leaving the bench in record numbers," at the same time that "the number of businesses that have filed for reorganization … increased 550 percent between 1980 and 1986, according to a study prepared for a congressional commission."[7]

That study, the Feinberg Report, found that "[o]f all federal judicial officers," bankruptcy judges "are the lowest paid, and a higher percentage of their purchasing power"—nearly 40%—"has been lost since 1969 compared to other officers within the judicial branch." Feinberg Report at 24, App. D. This led to intolerable consequences:

- "[P]remature resignations and retirements from the bankruptcy bench [were] higher than those for any other federal judicial office," yielding "a turnover rate among judges on the bankruptcy court of more than 70%" over a seven-year period. *Id.* at 25.

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[5] Michael Hiltzik, *Bankruptcy: A System Under Stress*, L.A. Times, July 26, 1987.

[6] John Dilenschneider, *Keep Bankruptcy Judges on the Bench*, N.Y. Times, Sept. 23, 1987.

[7] Ray Gibson, *On Bankruptcy, Critics In Surplus*, Chi. Trib., Dec. 27, 1987; *see also* Brian Levinson, *Bankruptcy case backlog taxing judges, straining system*, Houston Chronicle, Aug. 24, 1986; Jonathan Dahl & Cynthia F. Mitchell, *Beleaguered Bench: Resignations, Caseload Hurt Bankruptcy Court*, Wall Street Journal, Dec. 9, 1986.

- According to one survey of all sitting bankruptcy judges, 51% had "sold previously acquired real or personal property in order 'to make ends meet,'" and 47% had "borrowed money to pay living expenses since ascending to the bench"—more than half of whom "borrowed money from a lending institution which regularly appears before them in court." *Id.* at 21-22.

A significant pay increase was necessary "to reverse the steady stream of resignations from the bankruptcy bench, restore some stability to that court, and improve the ability of our government to recruit high quality lawyers to serve in a specialized position as bankruptcy judge." *Id.* at 9. The report recommended a salary increase set at "roughly 90% of the salary recommended for United States district court judges," which would "restore[] the parity that has historically existed between the salaries of district and bankruptcy judges." *Id.* at 3. "[T]he role of the bankruptcy judge as a judicial officer has grown ever more important and essential to the efficient function of the federal courts," the report concluded, and "their compensation should reflect their enhanced status in and unparalleled contribution to our federal court system." *Id.* at 15 & 19.

3. Congress Amends § 153 to Fix the "Inequity" In Salary Levels. In direct response to the Commission's concerns as reflected in the Feinberg Report, Congress enacted § 153(a), which set bankruptcy-judge salaries at an amount "equal to 92 percent of the salary of a judge of the district court of the United States." Pub. L. No. 100-202, § 101(a) [tit. IV, § 408(a)], 101 Stat. 1329, 1329-27 (1987). The Senate Report explained that the statute was "designed to correct [the] inequity" to bankruptcy judges caused by implementation of the new salary levels.[8] In addition, by removing bankruptcy judges from the COLA regime and pegging their salaries to those of district judges,

[8] *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill, H.R. 2763,* S. Rep. No. 100-182, at 68 (Sept. 25, 1987).

Congress responded to an additional "inequity": the possibility that bankruptcy judges would be denied COLAs even as other judicial officers—including some Article I judges (as discussed below)—would receive COLAs by virtue of having their salaries linked to Article-III-judge salaries.

One year later, Congress ensured that this linkage would extend to retired bankruptcy judges and the surviving spouses of bankruptcy judges by providing that both would receive compensation based on the salary amounts required under § 153(a).[9] Retired judges would be "entitled to receive . . . an annuity equal to" their salary at retirement. 28 U.S.C. § 377(a).[10] This annuity is subject to its own COLA, but the total annuity "may not exceed the salary then payable" under § 153(a). *Id.* § 377(e). And eligible surviving spouses receive an annuity based on the judge's "average annual salary," determined by §153(a). *Id.* § 376(l). The compensation of recalled judges (retired judges who later return to service) is likewise tied to § 153(a). They receive a retirement annuity, plus a supplemental payment "equal to the difference between that annuity and the current salary of the office"—making their total compensation the same as that of an active judge under § 153(a). *Id.* § 375(c). A recalled judge who returns to retirement receives a recalculated annuity "equal to the salary [then] in effect" for bankruptcy judges. *Id.* Thus, Congress ensured that current and former bankruptcy judges, as well as their surviving spouses, would all receive compensation that, through § 153(a), is ultimately tied to that of Article III district judges.

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[9] *See* Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988, Pub. L. No. 100-659, 102 Stat. 3910.

[10] Bankruptcy judges must be at least 65 years old and have served at least 14 years (the length of one term) to be eligible for an annuity under 28 U.S.C. § 377(a).

B. The Shared Interbranch Understanding That General COLA Denials Do Not Disrupt Statutory Parity Between Article I and Article III Judges' Salaries.

Section 153(a) did not just put bankruptcy judges and district judges on the same footing with respect to COLAs in general terms. It was enacted against the backdrop of a widely shared understanding that linking Article I and Article III judges' salaries ensured that the link would not be broken in the name of COLA denials held unconstitutional as to Article III judges.

1. Congress Enacts Pay Caps That Are Found Unconstitutional. Between fiscal years 1980 and 1982, Congress had enacted general legislation purporting to cap the pay of certain executive, legislative, and judicial-branch officials, including Article III judges.[11] In each of these years, however, Congress enacted the pay cap after the scheduled COLAs had already taken effect, so the legislation was unconstitutional as to Article III judges under *United States v. Will*, 449 U.S. 200, 230 (1980). Article III judges consequently received salary increases and were awarded back pay for the past COLA denials. *Will* had no effect for some federal officials, including bankruptcy judges, whose salaries at that time were entirely independent of Article III judges' salaries. But for those whose salaries were already linked to Article-III-judge salaries—including judges on the United States Tax Court and territorial district courts, and the Director of the Administrative Office—*Will* raised the following question: Would the pay caps be

[11] *See* Pub. L. No. 96-86 (Oct. 12, 1979) (FY 1980); Pub. L. No. 96-369 (Oct. 1, 1980) (FY 1981); Pub. L. No. 97-51 (Oct. 1, 1981) (FY 1982).

effective as to them, thereby implicitly repealing their statutory linkage to Article-III-judge salaries?[12]

2. Article I Judges With Linked Salaries Receive Back Pay. The universal answer at the time was no: Congress's specific statutory linkage to Article III salaries trumped the more general pay-cap legislation. Based on that understanding, the Administrative Office of the U.S. Courts increased the pay of all officers whose salaries were linked to Article-III-judge salaries, including the district judges for the territorial courts.[13] Similarly, the U.S. Tax Court, in its independent administrative capacity, raised its judges' salaries and distributed back pay to maintain parity with district-judge salaries. The Tax Court made that decision based on its own internal analysis, coupled with the Administrative Office's "issuance of back pay to the territorial judges."[14] In addition, "the judges of the Superior Court and the Court of Appeals for the District of Columbia, whose salaries are respectively linked to those of United States District Court and Court of Appeals judges, [had] already received retroactive pay." *Id.* The Executive Branch agreed: the General Counsel for the Defense Department indicated in a memorandum "that the judges of the Court of Military Appeals, whose salaries are linked to those of the judges of the court of appeals, would receive retroactive pay." *Id.* With that, "the list of

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[12] *See* 26 U.S.C. § 7443(c) ("(1) Each [tax court] judge shall receive salary at the same rate and in the same installments as judges of the district courts … (2) For rate of salary and frequency of installment see section 135…"); 48 U.S.C. §§ 1424b(a), 1614(a), 1821(b)(1) (territorial district-court judges; same salary as district judges of the United States); 28 U.S.C. § 603 ("The salary of the Director [of the Administrative Office] shall be the same as the salary of a district judge.").

[13] *See Rates of Pay for Certain Officer and Employees of the Judicial Branch*, Pay Order 82-2, 47 Fed. Reg. 4,715, 4,716 (Feb. 2, 1982).

[14] Rutter Decl., Ex. A (Letter from Chief Judge of the Tax Court to the Clerk); *see also* Dawson Decl., Ex. A (Mem. from Judge Wilbur to Chief Judge of the Tax Court) (setting forth detailed arguments against repeal by implication).

judges and official whose salaries are linked to the Article III judges [was] complete"—they all received salary increases and back pay. *Id.*

3. The Comptroller General's Opinion: Parity Trumps Pay Caps. Congress did not question or seek to overturn any of these adjustments or back-pay distributions, with one notable exception: One Congressman asked the Comptroller General to review the legality of the pay increase with respect to the Director of the Administrative Office—whose salary was set by statute "the same as the salary of a district judge," 28 U.S.C. § 603—as well as two positions whose salaries were set by reference to the Director's salary (the Director of the Federal Judicial Center and the Chief Justice's Administrative Assistant).[15] After inviting and receiving a detailed letter from the General Counsel of the Administrative Office "defending the higher salary for these three positions on the basis of the statutory provisions directly linking the pay of the three positions to the pay of a Federal district judge," the Comptroller General issued a published opinion on the question. *See Matter of: William E. Foley, et al.,—Application of "Pay Caps" to Three Judicial Branch Positions*, 61 Comp. Gen. 642 (Sept. 27, 1982) (attached as Appendix A); Letter from Carl H. Imlay, General Counsel of the Administrative Office, to the Comptroller General (June 17, 1982) (attached as Appendix B) ("AO Letter").

The Comptroller General's opinion agreed with the Administrative Office. "The key issue," it reasoned, is determining which congressional policy should govern here: "the intent of the Congress to link the pay of the Director and district judges or the intent

[15] The Comptroller General is the officer of the Legislative Branch entrusted with authority over the law of appropriations. *See Bowsher v. Synar*, 478 U.S. 714, 731 (1986). "Congress created the office because it believed that it 'needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations.'" *Id.* at 730-31 (1986) (quoting H. Mansfield, *The Comptroller General: A Study in the Law and Practice of Financial Administration* 65 (1939)).

of Congress to apply the pay cap to the Director"? *Id.* at 644. After reviewing "the two acts, and their legislative history," the Comptroller General "concluded that the linkage of the pay of the two provisions is paramount." *Id.* The linkage statute's language was "specific" and "unambiguous"—it focused directly on the relationship between the salaries of district judges and the Director of the Administrative Office, and it spoke in clear terms about what that relationship was supposed to be. *Id.* at 644-45. By contrast, the pay-cap legislation—which "purportedly cover[ed] all high-level executive, legislative, and judicial branch employees"—made "no express reference to the Director's salary and no attempt to amend or repeal" the specific statutory linkage. *Id.*

The Comptroller General determined that it was not "appropriate to undo that linkage in the absence of clear congressional intent to repeal or limit the operation of [the linkage statute]." *Id.* at 645. "[R]epeals by implication," the Comptroller General explained, "are not favored." *Id.* (citing *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)). And "without clear intention, a specific statute will not be controlled or nullified by a general statute, regardless of the priority of enactment." *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)). The Comptroller General thus concluded that "despite the general application of the pay caps, the salaries of these three judicial-branch positions have been properly set at a rate 'the same as' that of a district judge," as required "by specific statutory authority." *Id.* at 642 & 645.

C. History Repeats Itself: Congress Once Again Enacts Unconstitutional COLA Denials as to Federal Judges

The Ethics Reform Act of 1989 provided for automatic annual COLAs to protect federal judges' income from inflation and preserve a judge's real salary over time. Pub. L. No. 101-194, 103 Stat. 1716 (1989). For fiscal years 1995, 1996, 1997, and 1999,

however, the salary adjustments mandated by the 1989 Act did not take effect because, in each of these years, Congress inserted language in general appropriations legislation stating that the salaries of federal judges would not be adjusted.[16] As a consequence, bankruptcy judges also did not receive an adjustment to their salaries. In addition, for fiscal years 2007 and 2010, Congress failed to enact legislation approving the adjustments provided for by the 1989 Act and federal judges received no salary adjustments in those years.

In 2012, the Federal Circuit held that the 1989 Act created a firm judicial expectation of COLAs protected by the Compensation Clause and that, "[b]y enacting blocking legislation in 1995, 1996, 1997, and 1999, Congress broke [its prior] commitment and effected a diminution in judicial compensation." *Beer*, 696 F.3d at 1178-79, 1185. Apart from this constitutional holding, the court further held that the federal judges should have received the 1989 Act's adjustments in 2007 and 2010 because the government "had no statutory authority to deny them." *Id.* at 1185.

D. The Proceedings in This Case and the Government's Motion for Summary Judgment in *Cornish*

The plaintiffs' claims in this class action parallel those in *Cornish v. United States*, 12-861C. In both cases, the claims are straightforward: (1) Section 153(a) guarantees bankruptcy judges a salary set "equal to 92 percent" of a district judge's salary, including any COLAs provided for by the 1989 Act; (2) *Beer* held that district judges had been unlawfully denied COLAs provided for by that Act in fiscal years 1995, 1996, 1997, 1999, 2007, and 2010, and were therefore entitled to back pay and a salary increase as a

[16] *See* Pub. L. No. 103-329, § 630(a)(2), 108 Stat. 2382, 2424 (Sept. 30, 1994) (FY 1995); Pub. L. No. 104-52, § 633, 109 Stat. 468, 507 (Nov. 19, 1995) (FY 1996); Pub. L. No. 104-208, § 637, 110 Stat. 3009, 3009-364 (Sept. 30, 1996) (FY 1997); Pub. L. No. 105-277, § 621, 112 Stat. 2681, 2681-518 (Oct. 21, 1998) (FY 1999).

result; (3) bankruptcy judges are similarly entitled to back pay and a salary increase so that their salary remains "equal to 92 percent" of a district judge's salary, as required by § 153(a). Retired and recalled judges, as well as surviving spouses, are likewise entitled to compensation tied to § 153(a).

The government's summary-judgment motion in *Cornish* makes one argument: that bankruptcy judges are "not protected by the Compensation Clause from having [their] pay diminished," so they are not entitled to "receive 92 percent of the salary a district judge receives after the [unlawfully withheld] adjustments" are included." Gov. Mot. 1 & 7-8. The government does not explain why the amount "Congress intended [them] to receive" should not be "equal to 92 percent" of a district judge's salary, as provided by § 153(a). Nor does the government explain how the 2007 and 2010 COLA denials could possibly apply to bankruptcy judges given the Federal Circuit's holding that the government "had no statutory authority to deny them." *Beer*, 696 F.3d at 1185.

ARGUMENT

I. The Government's Argument Is Inconsistent with the Text and Purpose of § 153(a).

A. Under § 153(a)'s text, bankruptcy judges must receive 92% of a district judge's salary, including any COLAs provided under the Ethics Reform Act of 1989.

"As in any case of statutory construction, [the] analysis begins with the language of the statute." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). "And where the statutory language provides a clear answer, it ends there as well." *Id.* The language of § 153(a)—the statute that directly affects bankruptcy-judge pay—provides a clear answer to the question presented in this case. It mandates that bankruptcy judges receive "a salary at an annual rate that is equal to 92 percent of the

salary of a judge of the district court of the United States as determined pursuant to section 135." Section 135, in turn, provides that a district judge's salary will be "adjusted by section 461 of this title." And section 461 is the provision applying COLAs to federal judges—including those COLAs provided for by the Ethics Reform Act of 1989. *See* 28 U.S.C. § 461(a) (citing 1989 Act). So the plain meaning of § 153(a) is this: Bankruptcy judges are entitled to receive 92% of the total salary provided to district judges, including any COLA applicable to them under the 1989 Act. Put differently, "[w]hen the salary of the district judges is adjusted pursuant to 28 U.S.C. §§ 135 and 461, that adjustment automatically and simultaneously elevates the salary" of bankruptcy judges. AO Letter at 4, App. B.

That plain meaning resolves this case. Under *Beer*, district judges were entitled to receive COLAs provided by the 1989 Act in fiscal years 1995, 1996, 1997, 1999, 2007, and 2010. By application of § 153(a), then, bankruptcy judges similarly were entitled to receive a salary equal to 92% of the full district-judge salary for each of those years—incorporating the unlawfully withheld COLAs—and for each subsequent year in which district-judge salaries did not include COLAs to which the district judges were entitled.

The government's summary-judgment motion offers no textual argument to counter this natural reading, and certainly not one based on § 153(a). That is not surprising. For the government to prevail, § 135 would have to provide effectively *two different* salaries: (1) the properly adjusted salary that district judges are entitled to, and (2) a shadow salary that excludes required COLAs and comes into play only when calculating bankruptcy judges' salaries under §153(a). That cannot be right.

So the government instead makes a plea for ambiguity. It contends (at 7) that "the language" of § 153(a) "does not address the question at hand—that is, what happens to

the salary of bankruptcy judges when Congress's decision not to provide COLAs to district judges is deemed unconstitutional as to district judges." But what happens in that situation is that the COLAs must be provided to district judges under § 461. And when district judges receive COLAs under that section, § 153(a) demands that bankruptcy-judge salaries go up as well.

The same is true for retired and recalled bankruptcy judges, as well as bankruptcy judges' surviving spouses—all of whom receive compensation tied to § 153(a) as part of Congress's "interlocking network of statutes" setting judicial pay. *Will*, 449 U.S. at 202. Retired judges are "entitled to receive . . . an annuity equal to" their salary at the time of retirement, subject to its own COLA, provided that the total annuity does "not exceed the salary then payable" to active bankruptcy judges. *Id.* § 377(a) & (e). Recalled judges receive both an annuity and a supplemental payment "equal to the difference between that annuity and the current salary of the office"—meaning that their total compensation is the same as active judges under § 153(a). *Id.* § 375(c). And eligible surviving spouses receive an annuity based on the judge's "average annual salary." *Id.* § 376(l). Section 153(a), in other words, entitles these individuals to increased compensation no less than it does active bankruptcy judges. Absent any ambiguity, § 153(a)'s plain meaning should control.

B. Section 153(a)'s purpose is to achieve parity between bankruptcy-judge and district-judge pay—a purpose that would be destroyed by the government's argument.

Even if § 153(a) were somehow ambiguous, its purpose is not: It embodies a strong congressional policy of parity in pay increases for bankruptcy judges and district judges. And the government's argument would unquestionably destroy that purpose. The government does not attempt to argue otherwise.

Section 153(a) was a direct response to the President's decision to increase the pay disparity between bankruptcy judges and district judges. Whereas "historically the relationship" between the two had been "recognized at around 90 percent"—and the Quadrennial Commission had recommended a relationship of approximately 92%—the President "dramatic[ally]" reduced the relationship to 81%. *See* CRS Memorandum, App. C. Section 153(a) was "designed to correct [that] inequity" and ensure parity going forward. S. Rep. No. 100-182, at 68.

Congress understood that this parity would extend to COLAs—including to those that applied to district judges solely by virtue of the Compensation Clause. That was the shared understanding of all three branches. Indeed, after *Will*, the Administrative Office gave salary increases and back pay to officers whose salaries were linked by statute to those of Article III district judges, even though an across-the-board pay cap was then in effect for federal officials. *See* Pay Order 82-2, 47 Fed. Reg. at 4,716. The General Counsel of the Administrative Office defended these pay increases, and the Comptroller General issued a published opinion approving them. 61 Comp. Gen. 642, App. A. By contrast, bankruptcy-judge salaries at the time were subject to COLAs (and COLA denials) independently of district judges, so they did not receive any salary increase or back pay as a result of *Will*. *See* Feinberg Report at 7 n.1, App. D (noting that, prior to § 153(a)'s enactment, appropriations to pay bankruptcy judges' COLAs "were withheld on a number of occasions").

By removing bankruptcy judges from the COLA framework and linking their salaries to those of district judges, then, Congress intended that bankruptcy judges would benefit from any determination that district judges had been unconstitutionally denied COLAs. *See Williams v. United States*, 240 F.3d 1019, 1026 (Fed. Cir. 2001), *overruled on other*

grounds by Beer v. United States, 696 F.3d 1174 (Fed. Cir. 2012) (noting that a congressional resolution on federal judges' pay was issued in apparent response to Comptroller General opinions); *cf.* Robert G. Skelton & Donald F. Harris, *Bankruptcy Jurisdiction and Jury Trials: The Constitutional Nightmare Continues*, 8 Bankr. Dev. J. 469, 517 (1991) ("§ 153 represents the present congressional policy of not subjecting bankruptcy judges' salaries to reduction."). The government's argument would undermine that policy of parity by compensating bankruptcy judges at an amount significantly below the 92% level mandated by Congress.

Indeed, on the government's view, district judges would receive an annual salary of $197,100, while bankruptcy judges would receive a salary of only $160,080—or 81% of a district judge's salary. That would mark a permanent return to the same scenario that Congress found intolerable in 1987: Bankruptcy judges would see their salaries drop sharply relative to district-judge salaries—to 81%—and bankruptcy judges would be treated differently than district judges with respect to COLA denials. Section 153(a) was enacted to end exactly that state of affairs.

II. The Blocking Legislation Does Not Demonstrate An Intent to Destroy the Parity Mandated By § 153(a).

The government's sole argument is based not on the text or purpose of § 153(a), but on the supposed purpose of the blocking legislation that Congress later enacted in appropriations legislation. That argument (at 6) is as follows: "Congress knew and intended that the blocking legislation would affect not only Article III judges" directly, but also indirectly those "judges whose salary is dependent upon the salary of Article III judges." And that indirect purpose, the government argues, must be furthered even though the direct aim has been held unconstitutional.

For starters, this argument does not apply to the 2007 and 2010 COLA denials. Congress did not enact blocking legislation for those years. And *Beer* held that these denials were not authorized by statute. 696 F.3d at 1186. That *statutory* holding—which is binding on this Court, and which the government does not mention—applies with full force here, and for that reason alone the government is not entitled to summary judgment on these claims; the plaintiffs are.

But even as to the other COLA denials, the government's argument comes up short. The blocking legislation did not mention bankruptcy judges and did not apply to them directly. It affected their salaries only by virtue of § 153(a)—a statute that ensures parity. The government's argument, in other words, is that Congress—by indirectly denying COLAs to bankruptcy judges through a statute that links their salaries with those of district judges—somehow demonstrated an intent to sever that link should "Congress's decision not to provide COLAs to district judges [be] deemed unconstitutional as to district judges." Gov. Mot. 7. But how could Congress have intended to *destroy* parity by using a mechanism designed to *ensure* it? The government does not say. Even if the text of all the relevant statutes could plausibly be read together in the way that the government suggests, the question here is not whether Congress intended, in some general sense, to deny COLAs to Article I judges when it enacted the blocking legislation. Rather, the question is whether Congress manifested any intent that the blocking legislation apply to bankruptcy judges *even if* it would not apply to district judges—whether Congress, that is, would have intended to pursue the purpose of budget-cutting at the cost of destroying the parity mandated by § 153(a).

But "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). "Deciding what competing values will or will not be

sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statutes primary objective must be the law." *Id.* at 526. Reading the blocking legislation "for all that it might be worth," *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007), as the government does here, runs headlong into the presumption that "repeals by implication are not favored," *Posadas v. National City Bank*, 296 U.S. 497, 503, (1936); *see also Morton*, 417 U.S. at 549. "An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (citations and internal quotation marks omitted); *see also Posadas*, 296 U.S. at 503 ("[T]he intention of the legislature to repeal must be clear and manifest."). Outside these limited circumstances, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Nat'l Ass'n of Home Builders*, 551 U.S. at 663 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

Here, the presumption against implied repeals "applies with especial force" because "the provision advanced as the repealing measure was enacted in an appropriations bill." *Will*, 449 U.S. at 221-22. It is difficult to believe that Congress would have wanted general short-term budget-cutting legislation applicable to a broad range of government salaries on equal terms to repeal a substantive statute embodying "the intent of Congress to mandate a permanent parity" in salary. AO Letter at 3, App. B. Moreover, the government's reading is particularly suspect because it "would not only abrogate [§ 153(a)'s] statutory mandate, but also result in the implicit repeal of many

additional otherwise categorical statutory commands"—the linkage statutes for Tax Court judges and territorial district court judges, for example. *Nat'l Ass'n of Home Builders*, 551 U.S. at 663; *see* AO Letter at 7, App. B (arguing that general pay cap legislation should not be read to implicitly repeal the "Congressional policy of affixing certain rates of pay for federal officials directly to the salary of a judge of the United States," a policy that reflects both "a trend" across multiple positions and "a deliberate legislative choice"); 61 Comp. Gen. at 645 (concluding that it is not "appropriate to undo that linkage in the absence of clear congressional intent to repeal or limit the operation of [the linkage statute]").

Ultimately, the government's argument asks this Court to perform a feat of legal alchemy—to not only read a substantive statute mandating parity to achieve permanent *dis*parity, but to do so in the name of maximizing the ongoing impact of a one-year appropriations measure. But without any valid direct application to Article III judges, the blocking legislation "is incapable of functioning independently" as to bankruptcy judges. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). It could apply to them only through § 153(a). Accordingly, the legislation cannot truly "function in a manner consistent with the intent of Congress." *Id.* at 685. Where, as here, the direct effect of a statute has been deemed unconstitutional, courts should be wary of applying what remains in a way that "would cause results not contemplated or desired by the legislature," *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902), or "substitute, for the law intended by the legislature, one they may never have been willing by itself to enact," *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 636 (1895). To "dissect an unconstitutional measure and reframe a valid one," by "inserting limitations it does not contain," would be "legislative work beyond the power and function of the court." *Hill v. Wallace*, 259 U.S. 44, 70 (1922);

see Free Enter. Fund. v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162 (2010) (courts lack "editorial freedom" to "blue- pencil" a statute).

The government's motion in *Cornish* says (at 7) that the question in this litigation is whether bankruptcy judges "must receive 92 percent of the salary a district judge receives after the adjustments provided for by *Beer* or whether [they] must receive the salary Congress intended [them] to receive." That is a false choice—"the salary Congress intended [them] to receive" *is* "92 percent of the salary a district judge receives." The government provides no statute, report, statement, or piece of legislative history that even suggests that Congress intended to abandon the parity it mandates for bankruptcy judges' salaries when it enacted blocking legislation without so much as mentioning bankruptcy judges. The real question is whether Congress intended bankruptcy judges to get 92% of district judges' properly calculated salary, or 92% of some salary other than the one district judges ultimately get paid. Section § 153(a) elects the former.

* * *

For all these reasons, the government's argument would fail even if it were made on a blank slate. But this case does not come to the Court on a blank slate. Thirty years ago, decision-makers from all three branches faced the same question now before this Court. And every one of them came to the conclusion that a judicial officer whose pay is linked to that of an Article III judge is entitled to a salary increase and back pay when a COLA denial has been unconstitutionally applied to Article III judges. Because that shared understanding *preceded* the enactment of the statute at issue here, what was true then is even more true today. It is hard to believe that Congress wanted the opposite outcome but simply forgot to say so.

CONCLUSION

The Court should grant summary judgment in favor of the plaintiffs as to liability and set a schedule for additional briefing as to damages.

Respectfully submitted,

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August 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013, I electronically filed the foregoing motion for summary judgment through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties through the Court's electronic filing system.

/s/ Deepak Gupta

Deepak Gupta