No. 09-1395

IN THE
Supreme Court of the United States

PETER H. BEER, U.W. CLEMON, TERRY J. HATTER, JR., THOMAS F. HOGAN, RICHARD A. PAEZ, LAURENCE H. SILBERMAN, AND A. WALLACE TASHIMA,

Petitioners,

v.

UNITED STATES,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The Government does not deny the importance of the question presented by the petition, but simply insists that petitioners are not entitled to relief on the merits. In particular, the Government argues that *United States v. Will*, 449 U.S. 200 (1980), resolves this case, even though three Members of this Court have opined that *Will* did *not* resolve the constitutional question presented. *See Williams v. United States*, 535 U.S. 911, 918 (2002) (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari). And the Government argues that this Court's denial of certiorari in *Williams* (over the dissent of three Justices) effectively precludes this Court from resolving the constitutional question presented because that case was certified as a class action on behalf of all Article III federal judges. Neither argument has merit, and—more to the point here—neither argument provides any basis for this Court to deny review of these issues of manifest importance not only to judges but also (as underscored by the various *amici*) to the entire judicial system.

ARGUMENT

1. The Compensation Clause Issue Warrants This Court's Review.

The Government argues that this Court should deny review because "petitioners' constitutional claims lack merit and are foreclosed by this Court's decision in *Will*." Opp. 18. According to the Government, *Will* established the "rule" that "[a] judge's compensation is not 'diminished' unless it is reduced from the compensation that the judge previously 'received.'" *Id.* at 19.

But *Will* established no such "rule." To the contrary, *Will* held that the denial of salary adjustments violated the Compensation Clause in two years in which the judges had *not yet* "received" their adjusted salaries. *See* 449 U.S. at 205-09, 224-30. (In one of those years, the President signed legislation purporting to nullify a judicial salary adjustment on the very day that the adjustment took effect, *see id.* at 205, 224-25; in the other year, the President signed such legislation eleven days later, *see id.* at 208.) That is presumably why the Government itself does not apply the "rule" that it purports to embrace, arguing elsewhere in its brief that the key question under *Will* is when a salary adjustment "takes effect," Opp. 20; *see also id.* at (I), not when it is "received" by a judge.

The Government insists that *Will* resolved the issue presented here by focusing on the *timing* of legislation purporting to nullify a judicial salary adjustment. As explained in the petition, however, that focus reflects the fact that the judicial salary adjustments at issue in *Will* were discretionary, not mandatory. *See* Pet. 19-20. Thus, the only relevant variable in *Will* was the timing of the legislation purporting to nullify the adjustments—the legislation violated the Compensation Clause in the two years in which it was signed *after* the discretionary adjustments took effect, but not in the two years in which it was signed *before* those adjustments took effect. While *Will* thus establishes that Congress cannot nullify even a discretionary judicial salary adjustment *after* it has taken effect, *Will* did not hold—and had no occasion to hold—that Congress can nullify even a precise and definite judicial salary adjustment at any time *before* it takes

effect. Indeed, three Members of this Court have expressed serious "doubt" that *Will* can be read so broadly. *See Williams*, 535 U.S. at 918 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari).

The Government responds by asserting that "[a]dherence to the *Will* Court's actual *ratio decidendi* is essential ... because the Court's reasoning informed both the subsequent decisions of Congress and the legitimate expectations of federal judges." Opp. 20. But that assertion begs the question. No one can have reasonably relied on an overbroad reading of *Will* as having resolved the constitutionality of a statutory scheme not presented in that case. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2815 n.24 (2008).

Indeed, if—as the Government now suggests—"Members of the Congress that enacted the 1989 Act" had wanted to leave future judicial salary adjustments to the discretion of any future Congress, Opp. 20, they hardly would have enacted a system of self-executing and non-discretionary adjustments in the first place. It would be anomalous to think that Congress enacted such a system in 1989, along with substantial limitations on federal judges' ability to earn outside income, in the expectation that it would be undone. And as to the "legitimate expectations of federal judges" with respect to future salary adjustments established by law, *id.*, the Government reads *Will* not to *protect* any such expectations, but to *negate* their very existence.

In any event, the question whether *Will* sweeps as broadly as the Government contends (and as a divided panel of the Federal Circuit held in *Williams*

v. United States, 240 F.3d 1019, 1027-33 (Fed. Cir. 2001)) is assuredly worthy of this Court's review. Congress deserves to know whether it can enact a system of precise and definite future judicial salary adjustments to protect judges from even the most malignant hyperinflation, and judges deserve to know whether any such system is illusory. Regardless of whether the decision below is right or wrong, it presents an "important" constitutional question that should be decided by this Court. *Williams*, 535 U.S. at 911, 919, 922 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari).

The Government nonetheless argues that the "ongoing importance" of this question has been diminished by the enactment of legislation in 2001 purporting to revive a 1981 appropriations rider (known as Section 140) that barred any future judicial salary adjustments unless "specifically authorized by Act of Congress hereafter enacted." Opp. 24; *see also* Pub. L. 107-77, Title VI, § 625, 115 Stat. 748, 803 (Nov. 28, 2001), *codified at* 28 U.S.C. § 461 note; Pub. L. 97-92, § 140, 95 Stat. 1183, 1200 (Dec. 15, 1981), *codified at* 28 U.S.C. § 461 note. But the 2001 legislation, if anything, only underscores the ongoing importance of the issue by showing that Congress plans to continue denying, at its discretion, the self-executing and non-discretionary judicial salary adjustments established by the 1989 Act.

Putting aside the dubious constitutionality of the 2001 legislation, which singles out judicial compensation for disfavored treatment, *see Williams*, 535 U.S. at 918-19 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari)

(citing *United States v. Hatter*, 532 U.S. 537, 564 (2001)), it does not even purport to affect the salary adjustments established by the 1989 Act. The 2001 legislation did no more than revive a 1981 law that, by its terms, does not apply to judicial salary adjustments "specifically authorized by Act of Congress hereafter enacted." Pub. L. 107-77, Title VI, § 625, 115 Stat. 748, 803 (Nov. 28, 2001), *codified at* 28 U.S.C. § 461 note; Pub. L. 97-92, § 140, 95 Stat. 1183, 1200 (Dec. 15, 1981), *codified at* 28 U.S.C. § 461 note. Because the 1989 Act "'specifically authorized' (indeed mandated) future adjustments in judicial pay," *Williams*, 535 U.S. at 918-19 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari), "the 1989 Act falls well within the specific exception in [Section 140] for an 'Act of Congress hereafter enacted,'" *Williams*, 240 F.3d at 1027. The Government's passing suggestion that "hereafter" refers to 2001, not 1981, *see* Opp. 24 n.6, is incorrect: the 2001 legislation simply amended the 1981 legislation (which included the "hereafter" provision) by adding the proviso that "[t]his section shall apply to fiscal year 1981 *and each fiscal year thereafter*." Pub. L. 107-77, Title VI, § 625, 115 Stat. 748, 803 (Nov. 28, 2001) (emphasis added), *codified at* 28 U.S.C. § 461 note. The 2001 legislation thus purported only to give the 1981 legislation ongoing effect, not to alter its substantive scope. The Government certainly presents no evidence that Congress meant for the availability of judicial salary adjustments to turn on when a judge took office.

In any event, the 2001 legislation is a red herring in this case. Petitioners—like the majority of active Article III judges (not to mention senior or retired judges), *see Biographical Directory of Federal Judges*,

available at www.fjc.gov (last visited on August 10, 2010)—took office before the enactment of that legislation on November 28, 2001. Under no circumstances could that legislation affect their Compensation Clause claims, given that the whole point of those claims is that the 1989 Act established constitutionally protected compensation that could not thereafter be diminished.

And the substantial ongoing importance of this issue is only underscored by the fact that, since the complaint was filed, Congress blocked the judicial salary adjustment specified by the 1989 Act for 2010 (even though, as in 2007, it allowed the corresponding salary adjustment for high-ranking Executive Branch officials) and appears poised to do the same for 2011. *See* Pub. L. 111-165 § 1, 124 Stat. 1185 (May 14, 2010), *codified at* 2 U.S.C. § 31 note (blocking a 2011 salary adjustment for Congress which, in recent years, has always been linked to a salary adjustment for federal judges). Whatever hope this Court might once have had that "over time Congress will deal with the decline in judicial compensation, making good on the 1989 Act's inflation-adjustment promise," *Williams*, 535 U.S. at 919 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari), by now has been proven illusory.

2. The Government's Issue Preclusion Argument Provides No Basis To Deny Review.

The Government also argues that this Court should deny review because petitioners (like all persons who served as Article III judges from January 1, 1995 to December 31, 1997 and/or January 1 to December 31, 1999) were absent

members of the plaintiff classes certified under Rule 23(b)(2) in *Williams*. *See* Opp. 13-18. According to the Government, "principles of issue preclusion bar petitioners from relitigating the Compensation Clause issue and thus provide an independent ground for dismissal of petitioners' complaint." *Id.* at 13.

As an initial matter, it is neither necessary nor appropriate to address the Government's preclusion argument before addressing the merits of petitioners' claims. Preclusion, after all, "is an affirmative defense," *Taylor v. Sturgell*, 128 S. Ct. 2161, 2179 (2008); *see also* Fed. R. Civ. P. 8(c)(1), and it makes sense to determine whether a claim exists in the first place before considering whether an affirmative defense applies. Indeed, the Government expressly acknowledged below, and does not dispute here, that there is no need to address the preclusion argument (which is not jurisdictional) before the merits, and the lower courts never reached that argument at all.

In any event, the Government's issue preclusion argument fails on its own terms. The Government broadly asserts that petitioners are bound by the divided Federal Circuit's analysis of the Compensation Clause—a pure issue of law—in *Williams* because they were absent members of the no-notice, non-opt-out classes certified in that case. *See* Opp. 13-18. That assertion is incorrect.

It is well established that the preclusive effect of a federal-court judgment is a matter of federal common law, "which this Court has ultimate authority to determine and declare." *Taylor*, 128 S. Ct. at 2171; *see also Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-08 (2001). And

"[t]he federal common law of preclusion is, of course, subject to due process limitations." *Taylor*, 128 S. Ct. at 2171. For at least three reasons, the federal common law of issue preclusion, as molded by due process, does not bar petitioners' claims.

First, issue preclusion plays a sharply limited role with respect to the resolution of pure (or "unmixed") questions of law, like the Compensation Clause issue presented here. *See, e.g.*, *United States v. Moser*, 266 U.S. 236, 242 (1924); *Restatement (Second) of Judgments* § 28(2) (1982); *see also United States v. Stauffer Chem. Co.*, 464 U.S. 165, 170-71 (1984) (recognizing ongoing force of *Moser*); *Montana v. United States*, 440 U.S. 147, 162-63 (1979) (same). Indeed, this Court has explained that "[t]his exception [to otherwise applicable rules of preclusion] is of particular importance in constitutional adjudication," because "unreflective invocation of collateral estoppel [*i.e.*, issue preclusion] against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana*, 440 U.S. at 162-63. Given that the classes certified in *Williams* encompassed all Article III judges, the Government's issue preclusion argument would effectively transform this Court's denial of certiorari in *Williams* into a conclusive ruling on the merits, and make the Federal Circuit's divided ruling in that case the law of the land.

Second, issue preclusion must be applied with particular care in the class action context, given the bedrock norm that "everyone should have his own day in court." *Martin v. Wilks*, 490 U.S. 755, 762

(1989). In particular, an absent class member is always free to challenge the preclusive effect of a class action judgment on due process grounds. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 41-45 (1940); *see also Taylor*, 128 U.S. at 2172 ("properly conducted" class actions entitled to preclusive effect).

And *third*, it is axiomatic that due process (which informs both Rule 23 and the federal common law of preclusion, *see Taylor*, 128 S. Ct. at 2171, 2176) requires at a minimum both notice and an opportunity to be heard before property rights may be extinguished. *See, e.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In the class action context, that means that an absent class member cannot be foreclosed from pursuing a claim for monetary relief if he was provided neither notice nor an opportunity to opt out of the class. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257-61 (2d Cir. 2001), *aff'd in relevant part by an equally divided Court*, 539 U.S. 111 (2003); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted*, 510 U.S. 810 (1993), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994) (*per curiam*); *Johnson v. General Motors Corp.*, 598 F.2d 432, 437-38 (5th Cir. 1979). The Government thus misses the point by insisting that petitioners were "adequately represented" by the named plaintiffs in *Williams*, Opp. 14; this Court has squarely rejected the notion that "adequate representation, rather than notice, is the touchstone of due process in a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

The Government insists (based on no factual record whatsoever) that petitioners had "actual notice" of the *Williams* litigation and could and should have sought to opt out of the classes certified in that case. Opp. 17. That is so, according to the Government, because "notice of [*Williams*'] filing as a class action on behalf of federal judges serving between 1994 and 1997 was published in the February 1998 edition of *The Third Branch*, the monthly newsletter of the federal judiciary distributed by the Administrative Office of the United States Courts." *Id.*

But publication in a newsletter is not "actual notice"; to the contrary, it is a paradigmatic example of "constructive notice." *See, e.g.*, *City of New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296 (1953) (contrasting actual and constructive notice). Given the ease of providing actual notice to absent members of the *Williams* class, constructive notice is constitutionally inadequate. *See, e.g.*, *id.*; *see also Greene v. Lindsey*, 456 U.S. 444, 453-56 (1982). In this regard, the sophistication of the recipients is immaterial. *See, e.g.*, *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799-800 (1983).

In any event, the two-paragraph article in *The Third Branch* provided no notice whatsoever of the class certification in *Williams* or its preclusive effect. Rather, that article merely noted that several judges "have *filed* a class action suit" challenging the denial of judicial salary adjustments on Compensation Clause grounds. *Lawsuit Seeks to Restore COLAs*, *The Third Branch*, Vol. 30, No. 2 (Feb. 1998) (attached as Reply Appendix) (emphasis added). The article does not state that a class had been certified

(and indeed no class was certified until much later), define the putative class, or specify the effect of certification on absent class members. Thus, even assuming *arguendo* that petitioners read or should have read *The Third Branch* article, they would have had no reason to conclude that it was necessary or appropriate for them to do anything in connection with the *Williams* litigation to protect their rights. Under no circumstances can that article provide the constitutionally required notice to warrant issue preclusion.

Nor is there any merit to the Government's argument that petitioners should have sought to opt out of the non-opt-out classes certified in *Williams*. As an initial matter, this argument assumes that petitioners had notice of their membership in the classes certified in *Williams*, since petitioners obviously could not have sought to opt out of classes they did not know they were in. The argument also assumes that it is possible to opt out of a non-opt-out class, which Rule 23(b)(2) does not authorize. And even assuming *arguendo* that petitioners could have asserted a due-process right to opt out of the non-opt-out classes certified in *Williams*, *but see Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 120-21 (1994) (*per curiam*) (expressly declining to resolve this issue), the Government identifies no authority suggesting that petitioners were *required* to seek to opt out of those non-opt-out classes to avoid issue preclusion.

Given Congress' ongoing refusal to provide the judicial salary adjustments established by the 1989 Act, and the implications thereof for judicial independence and the separation of powers, the petition warrants this Court's review.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the Court should grant a writ of certiorari.

Respectfully submitted,

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