To be Argued by:
MICHAEL A. REBELL
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Court of Appeals

of the

State of New York

NEW YORKERS FOR STUDENTS' EDUCATIONAL RIGHTS ("NYSER"), *et al.*,

Plaintiffs-Respondents,

– against –

THE STATE OF NEW YORK, *et al.*,

Defendants-Appellants.

MIRIAM ARISTY-FARER, *et al.*,

Plaintiffs-Respondents,

– against –

THE STATE OF NEW YORK, *et al.*,

Defendants-Appellants.

BRIEF FOR PLAINTIFFS-RESPONDENTS

MICHAEL A. REBELL
475 Riverside Drive, Suite 1373
New York, New York 10027
Tel.: (646) 745-8288

MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
Tel.: (212) 309-6000
Fax: (212) 309-6001

Attorneys for Plaintiffs-Respondents

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PRELIMINARY STATEMENT

Plaintiffs ask this Court to expressly affirm that Defendant-Appellant New York State (the "State") has a self-executing, threshold duty to ascertain the "actual costs" needed to provide students in all New York's school districts with the opportunity to obtain a sound basic education in a manner fully aligned with student need, and then to fully fund its share of such costs. The State cannot possibly "ensure" its education finance system is even capable of providing constitutionally sufficient funding—let alone actually does so—until it adheres to this threshold duty, and it apparently will not without this Court's express affirmation that it must.

Article XI, § 1 of the New York State Constitution (the "Education Article") mandates that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." In the *Campaign for Fiscal Equity, Inc.* litigation ("*CFE Litigation*" or "*CFE*"), this Court concluded that "by mandating a school system 'wherein all the children of this state may be educated,' the State has obligated itself constitutionally to ensure the availability of a 'sound basic education' to all its children." *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 902 (2003)

(emphasis added).[1] That obligation requires the State to "ascertain the actual costs of providing a sound basic education," *id.* at 930, in a manner "calibrated to student need," *id.* at 929.

CFE thus made clear that the State, and no other entity, indisputably is charged with the duty to ensure New York's education finance system is constitutionally compliant.

Put simply, Plaintiffs allege that the State has not operated a constitutionally compliant education finance system for the last seven years. In 2007, the State started to implement a process it believed would allocate the "actual costs" needed to provide students in all districts with a constitutionally sufficient education—the Foundation Aid Formula—but abandoned it without repeal in the 2009–2010 school year.

The State's self-executing duty to fully fund education based on the ascertained "actual costs" needed to attain the constitutional standard should be axiomatic. Yet the State's core opposition to Plaintiffs' claims is that it has no duty to even attempt to take the first steps toward compliance with the Education Article. According to the State, before its duty to ascertain and fund the "actual

[1] The three Court of Appeals decisions from the *Campaign for Fiscal Equity, Inc.* litigation are hereinafter referred to as "*CFE I*" (*Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307 (1995)); "*CFE II*" (*Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003)); and "*CFE III*" (*Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14 (2006)).

costs" of a sound basic education can attach, students must first prove the insufficiency of State funding—at whatever level it happens to be at the time—on a district-by-district basis for every one of the 700 districts in New York.

Defendants press their obverse position with a false-binary, all-or-nothing view of New York's Education Article precedent. Defendants' incorrect logic posits that because prior litigants have prosecuted Education Article claims concerning one or several districts, and the existing case law thus reflects only that approach, a district-centric focus must be the only way to plead an Education Article claim. But Plaintiffs (who are the first to allege an Education Article claim premised on the State's breach of its threshold funding ascertainment and allocation duty) are not precluded from challenging a constitutional defect existing so plainly at the state, not the district, level.

Defendants' incorrect argument harms the roughly three million children who attend New York's public schools.

New York law cannot be read to foreclose pleading an Education Article claim by identifying a predicate structural defect in the State's funding process, the correction of which would inure to the benefit of students in all 700 districts in the state. District-based claims of inadequate inputs and outputs are one, but, as this case shows, cannot be the only, way to plead an Education Article violation. Plaintiffs have stated another way.

Only after the State has fulfilled its threshold funding ascertainment and allocation duty would it make sense to assess whether the fully funded amounts meet the constitutional standard at the individual district level. Indeed, albeit directed at New York City, this Court stated what can only be the universally applicable order of operations, and it supports Plaintiffs' approach: "Once the necessary funding level is determined, the question will [then] be whether the inputs and outputs improve to a constitutionally acceptable level." *CFE II*, 100 N.Y.2d at 930 (emphasis added).

In addition to alleging the State's breach of its threshold funding process duty, Plaintiff NYSER's Complaint alleges substantial deficiencies in the inputs currently provided to students in New York City, Syracuse, and seven other representative districts around the state. Despite the sufficiency of those allegations, it would be senseless to compel plaintiffs to test funding at the district level (let alone for every single district) when the State has concededly not yet fully funded the ascertained "actual costs" directed by either its Foundation Aid Formula or any alternative process designed to fully align funding with student need.

The sound logic and sensibility supporting Plaintiffs' Education Article claim is manifest. Under Defendants' incorrect view, students, not the State, would bear the threshold burden to "maintain and support" (*see* N.Y. Const.

art. XI, § 1) New York's education system. Students would first have to spend years litigating the facts and circumstances specific to all 700 districts before a court could require the State to take the very first steps needed to fulfill its constitutional funding obligation. The cycle of non-compliance and litigation could repeat *ad infinitum* because without an ongoing, self-executing duty to ascertain how much funding it estimates is actually needed to meet the constitutional standard and then fully allocate the amount, the State would always be free to abandon any prior efforts, court-ordered or otherwise.

Those are the inequitable circumstances now before this Court.

Plaintiffs allege that the findings and holdings issued throughout *CFE* elucidated constitutional reforms that were needed for the funding process at the statewide level, not merely for additional funding for students educated in New York City in the 1990s. The State understood (and the Court was aware) that the same rationale guiding *CFE II*'s decision—specifically the fundamental duty to ascertain and fully allocate the actual costs of providing a sound basic education according to need—necessarily applied to the State's funding process for all 700 districts, not just to the 38% of students in New York City. There is no room for a contrary understanding—students in districts throughout the state are no less constitutionally entitled to their full share of needs-based funding than those in the New York City schools.

That is why, as would be expected from a rational government attempting to attain constitutional compliance, the State responded to *CFE* by first undertaking a cost analysis to ascertain the "actual costs" it estimated were needed to meet the constitutional sound basic education standard in all districts. That ascertainment was a cornerstone for developing the Foundation Aid Formula, a needs-based funding process legislatively adopted and codified in N.Y. Educ. Law § 3204 in 2007. The Foundation Aid Formula represented the necessary agreement by the executive and the legislature, after *CFE III*, on what efforts they concluded should be taken over a four-year phase-in period to attain statewide compliance with the Education Article. The Formula was under development at the time of *CFE*, and it was understood that it would holistically address constitutional requirements for all districts through a unitized methodology, not by piecemeal variation on a district-by-district basis. It was thus no secret that the State's process reforms would necessarily apply to all school districts.

Plaintiffs allege the Foundation Aid Formula is the only mechanism the State ever developed to implement a process that ascertains and then allocates the actual costs of providing the opportunity to obtain a sound basic education. But the State abandoned the Formula following the 2008 recession. It first froze and then cut the State aid the Formula would have provided over four years.

Defendants contend the Foundation Aid Formula is constitutionally insignificant. App. Br. at 1–2, 49–54.[2] If this were true, it would mean the State has never purported to fund school districts based on an ascertained estimate of what is needed to provide the opportunity to obtain a sound basic education. Both sides thus agree that for at least the last seven years, the State has not funded the estimated actual costs needed to meet the constitutional standard.

Since abandoning the Foundation Aid Formula in 2009, the State has funded education in the exact same way that this Court held to be unconstitutional in *CFE*: by doling out "shares" determined not by a formula calibrated to ascertained costs and needs, but to the dictates of a "malleable" arrangement, determined by "three men in a room" and deal-making having no "perceptible relation," *CFE II*, 100 N.Y.2d at 929–930, to what students actually need to obtain a sound basic education.

These are the circumstances under which Plaintiffs ask this Court to expressly affirm that the nature of the State's constitutional duty under New York's Education Article includes a continuing and self-executing, threshold obligation to employ a formula or other needs-based method to ascertain and then fully fund the actual costs of providing students in <u>all</u> of New York's schools with the opportunity to obtain a sound basic education.

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[2] "App. Br." Cited herein refers to the Brief for Appellants submitted in this action and dated March 15, 2017.

The express affirmation now sought from the Court properly balances separation-of-powers principles.

Plaintiffs do not ask the Court to wade into the details of many conceivable ways in which Defendants could design a constitutionally compliant funding process if they choose to conclusively reject the Foundation Aid Formula. The Court is not being asked to approve any particular level of funding. Nor do Plaintiffs seek an order that would bind future legislatures to any particular permutation of a funding process that satisfies the State's threshold duty to ascertain and fully fund the costs needed to meet the constitutional standard. The confirmation sought from the Court fits squarely in the realm of situations in which it is proper for the judiciary to adjudicate the nature of the State's Education Article obligations.

Finally, we emphasize that Plaintiffs' approach to pleading an Education Article claim complements, not supplants, the district-level inputs-outputs-causation approach. Nor would Plaintiffs' Education Article claim here engender an outpouring of similar claims from other plaintiffs in the state. Once the Court expressly affirms the State has a threshold duty to ascertain and fully fund the constitutionally required level of education for all three million students in New York, the State presumably will adhere to that duty. If the State begins to operate a funding system premised on a full, needs-based allocation of ascertained "actual

costs," to which the judiciary's deference on the standard of rationality would apply, the bar to suing on alleged inadequacies in individual districts would likely be even higher.

Accordingly, Plaintiffs request that this Court affirm the lower court's decision upholding their Complaints.

In doing so, Plaintiffs respectfully ask the Court to focus further proceedings in this case by explicitly clarifying that the State cannot ensure its compliance with the Education Article without first fulfilling its self-executing duty to finance education using a process that ascertains and at all times fully allocates its portion of the "actual costs" of providing students in all New York's school districts with the opportunity to obtain a sound basic education in a manner fully aligned with student need.

Plaintiffs further ask the Court to confirm that an Education Article claim is stated by properly alleging the State has failed to fulfill that threshold duty. On remand, the trial court would then determine whether the State has, in fact, (i) ascertained the "actual costs" needed to meet the constitutional standard in all districts, and (ii) fully funded its portion of those costs in a manner calibrated to student need. Plaintiffs would seek to demonstrate that in 2007 the State did undertake a constitutionally valid process that produced the Foundation Aid Formula, but since 2009, the State has failed to fully fund the amount of state aid

called for by that formula, nor has it undertaken any alternative process to ascertain and fully allocate its share of the "actual costs."

If these facts are established, Plaintiffs would then expect to request that the lower court issue an order requiring the state to either (1) fully fund the Foundation Aid Formula that is still on the statute books, or (2) promptly undertake a new constitutionally valid process to ascertain the actual costs of providing all students in the state the opportunity for a sound basic education under current conditions, and then fully fund its share of those costs in a manner fully aligned with student need.

COUNTERSTATEMENT OF THE ISSUES PRESENTED

(1) Does the State's ongoing obligation to ensure a constitutionally compliant education finance system under the Education Article include a threshold, self-executing duty to first ascertain the "actual costs" of providing New York's three million public schoolchildren with the opportunity to obtain a sound basic education and then to fully provide State funding needed to meet that actual student need, to ensure that all school districts have the resources necessary for providing the opportunity for a sound basic education?

(2) Post-*CFE*, can Plaintiffs plead an Education Article claim for the State's failure to follow a funding process that ascertains and fully allocates the

State's portion of education aid needed to provide all students, not just those in New York City, with the constitutional opportunity for a sound basic education?

(3) In *CFE III*, to resolve the impasse between the legislature and executive on the constitutionally sufficient funding increase needed for New York City schools, did this Court intend to fix $1.93 billion (with inflation and cost-of-living adjustments) as a definitive constitutional funding level, or did it intend to establish that amount as the lower-end of a range of figures that the evidence had indicated would be rational and appropriate for meeting constitutional needs, and direct the legislature and executive to choose a final amount from within that range?

(4) Can fiscal constraints like the "gap elimination adjustment" ("GEA"), adopted in times of recession or otherwise, constitute proper grounds for the State to fund less than its portion of the aid needed to meet the ascertained "actual costs" of providing all students the opportunity for a sound basic education?

(5) In enacting education funding appropriations or other legislation having a direct nexus to State education aid, must the State account for how the legislation will impact schools' abilities to provide all students with the opportunity for a sound basic education?

COUNTERSTATEMENT OF THE CASE

I. Background of the *CFE Litigation*

The *CFE* plaintiffs brought a case seeking an additional amount of State education aid needed to provide New York City schools with a constitutionally sufficient level of funding. *See CFE I*, 86 N.Y.2d at 315. It took them 14 years, including three trips to this Court, to compel the State to ascertain how much additional funding was at that time needed for only the City's schools. While the State dutifully did so for the City and the state in 2007, two years later, it abandoned the Foundation Aid Formula and reverted to the unconstitutional method of funding education by "three men in a room" and deal-making politics.

A. *CFE I*

CFE I upheld the plaintiffs' complaint and outlined the elements of an Education Article claim challenging the amount of funding the State provided to the New York City schools. The Court first explained that a "sound basic education" "should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." *Id.* at 317. The Court provided a "template" for the elements of a district-focused cause of action under the Education Article, which later *CFE* courts, including this Court in *CFE II*, further characterized as a required showing that deficient "inputs" from the State caused deficient "outputs" at the student level in a given district. *Id.* at 317-18.

CFE I suggested that its inputs-outputs-causation template was designed for the district-level funding challenge made in that case:

> In order to succeed in the specific context of this case, plaintiffs will have to establish a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children.

Id. at 318 (emphasis added).

B. *CFE II*

CFE II reaffirmed that the State holds the ultimate obligation to "ensure" a constitutionally compliant education finance system under the Education Article. "[B]y mandating a school system 'wherein all the children of this state may be educated,' the State has obligated itself constitutionally to ensure the availability of a 'sound basic education' to all its children." *CFE II*, 100 N.Y.2d at 902 (emphasis added) (quoting *CFE I*, 86 N.Y.2d at 314); *see also CFE II*, 100 N.Y.2d at 924 (rejecting the State's "Local Funding" arguments and affirming "that the ultimate responsibility to address th[e] problem still lay[s] with the State.").

CFE II further held that while the legislature has discretion in shuffling its "spending priorities," the Court has "a duty to determine whether the State is providing students with the opportunity to obtain a sound basic education," *CFE II*, 100 N.Y.2d at 920, the only inference being the legislature cannot fund less than required to attain the constitutional standard. The Court also rejected the State's "Comparative Spending" argument because neither comparison to other states nor

a high spending level generally, without being tethered "to student need," would demonstrate "students are receiving a sound basic education." *Id.* at 921.

Critically, *CFE II* admonished the State to correct what the lower courts had concluded were constitutional defects in the State's lack of a needs-based funding process for ascertaining and allocating its portion of education aid to all districts statewide. Those constitutional defects had been clearly elucidated throughout the *CFE* Litigation.

At trial, the evidence proved statewide distribution of education funds was not calibrated to the actual costs of providing a sound basic education, and to student need in districts throughout the state. *Campaign for Fiscal Equity v. State*, 187 Misc. 2d 1, 83, 88 (Sup. Ct. N.Y. Cty. 2001). "[R]esources [we]re not aligned with need. Those schools with the greatest need frequently ha[d] the fewest fiscal resources . . . ." *Id.* at 83.

The court found it was "an open secret in Albany" that, statewide, funding was calibrated to the dictates of "three men in a room." *Id.* at 88. The hodgepodge of funding formulas existing at the time was a sham, and the amounts of State aid different districts received were based on implicit "shares" negotiated behind closed doors to serve political considerations, unrelated to student need, during the annual budget negotiations process.[3]

[3] The court found that:

Accordingly, the *CFE II* Court agreed with "the trial court's description of the existing education funding scheme" and expressly directed the State to consider how it should fix the "education funding scheme . . . to align funding with need." *CFE II*, 100 N.Y.2d at 929.

The Court held that State education funding (as enabling the needed "inputs") should "be calibrated to student need." *Id.* It also found the "political process"—which manipulated statewide distribution of education funds—"allocat[ed] to City schools a share of state aid that d[id] not bear a perceptible relation to the needs of City students." *Id.* at 930.

The record in *CFE II* concerned only New York City, and given the nature of the case before it, the Court determined that it was ultimately constrained to order the State to "only ascertain the actual cost of providing a sound basic education in New York City." *Id.* at 930. Thus, *CFE II* fashioned an express remedy targeting only New York City's schools. Record on Appeal ("R.") 141-42

> State aid has historically been divided without reference to the formulas. . . . [A]nnual increases in State education aid are allocated pursuant to an agreement struck by the Governor and the leaders of the State Assembly and the State Senate as part of the overall annual budget negotiations. These negotiations produce a general agreement on the overall amount to be spent on education and how it is to be distributed across the State which is then ratified by the Legislature. This phenomenon is commonly referred to as "three men in a room."

Id. (emphasis added).

(¶¶ 32-35). *CFE II*'s remedial order required the State to do the following within thirteen months:

> (1) "ascertain the actual cost of providing a sound basic education in New York City"; (2) adopt "[r]eforms to the current system of financing school funding and managing schools [to ensure] . . . that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education"; and (3) "ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education."

R. 141 (¶ 33).

But the Court in *CFE II* was aware that the "political process" allocated arbitrary "shares" of State education aid to all districts, and that the "existing education funding scheme" was "needlessly complex, malleable and not designed to align funding with need." *CFE II*, 100 N.Y. 2d at 929. The Court's message to the State regarding its defective process overall was clear. As a practical matter, the Court's remedial order meant the State would need to broadly reform its funding process for statewide application. Determining how much additional funding was required for New York City would be accomplished through a process that would necessarily determine how much more was likewise needed for students in the rest of New York's approximately 700 school districts.

C. *CFE III*

Responding to *CFE II*, Defendants attempted to reform the State's education finance system as applied to all districts statewide. As *CFE III* noted, "[w]ithin a

matter of weeks [of *CFE II*], Governor Pataki [had] issued an executive order creating the New York State Commission on Education Reform, charged with recommending, to the Executive and the Legislature, education financing and other reforms that would ensure that all children in New York State have an opportunity to obtain a sound basic education." *CFE III*, 8 N.Y.2d at 21–22 (emphasis added).

Governor Pataki proposed a funding plan to the legislature, but it refused to adopt it and that impasse precluded the state from adopting legislation needed to fulfill the constitutional obligations. The *CFE* plaintiffs, therefore, began another round of litigation.

The trial court appointed a panel of referees to consider costing-out studies submitted by the parties and the state education department ("SED"). That panel recommended an increase in operational funding that would provide students in the New York City public schools an increase of $5.63 billion in annual funding by the end of a four-year phase-in period. *Campaign for Fiscal Equity, Inc. v. State*, No. 0111070/1070, 2005 WL 5643844, slip op. at 2 (N.Y. Sup. Ct., N.Y. Cty. Feb. 14, 2005). The trial court accepted that recommendation and issued a compliance order based upon it.

The Appellate Division modified the trial court's order to allow the governor and legislature to break their impasse by considering a range of figures from $4.7 billion to $5.63 billion, which it considered reasonable estimates of the

"actual cost" of a sound basic education for New York City. *Campaign for Fiscal Equity, Inc. v. State*, 29 A.D.3d 175, 189 (1st Dep't 2006). This Court further modified that order to include $1.93 billion at the lower end of the permissible range of figures. *CFE III*, 8 N.Y.3d at 27. That was the number that Governor Pataki had advocated, and it represented the minimum amount in a range of figures that had been recommended by consideration by Standard and Poor's, the expert consultants who had been retained by his Commission on Education Reform. *Id.* at 24.

II. The State Responded to *CFE* with Statewide Efforts Toward Constitutional Reform that Culminated in Adoption of the Foundation Aid Formula.

Defendants holistically responded to the *CFE Litigation*. They acknowledged inherent constitutional defects in the education finance system and undertook efforts to reform the system on a statewide basis—including implementing a process to calibrate all funding with "actual needs"—as *CFE II* directed they should do. R. 132, 143–46, 175, 177-78, 185–86, 188 (¶¶ 2, 38–44, 134, 142, 145, 146, 170–73, 179). *CFE*'s holdings and findings clarified efforts the State would need to take to attain constitutional compliance, and the executive and legislative branches acted rationally in attempting to do what they understood was needed to comply with the Education Article.

Accordingly, Defendants implemented major initiatives to (1) ascertain the estimated actual cost of providing a sound basic education based on student need within the permissible ranges for New York City set forth in *CFE III*, also considering actual cost needs on a statewide basis, and (2) establish a new funding allocation methodology—the Foundation Aid Formula—to calibrate distribution of funds with need, and ensure the opportunity for a sound basic education would be offered to all students statewide by the end of a four-year phase-in. R. 143–46, 185–86 (¶¶ 38–44, 170–73); *see also* App. Br. at 14–15 (the Formula "altered the State's method of apportioning general operating aid among school districts" and would have phased in additional "total state and city funding . . . by $5.4 billion over the course of four years").

To calculate the estimated actual costs of a sound basic education, in the wake of *CFE II*, the State Education Department ("SED") first developed a "successful schools" cost analysis methodology, and further refined that methodology following *CFE III*. R. 143–44 (¶ 38). Post-*CFE III*, SED updated the definition of "successful schools," gathered new data, and, among other reforms, added to the analysis an extra cost weighting for students living in sparsely populated rural districts. R. 143–44 (¶ 38), 186 (¶ 173). The Foundation Aid Formula responded directly to *CFE*'s call for a simplified, needs-based funding process. R. 144–146. It has four basic components: (1) a base amount per

pupil reflecting the cost to educate students, based on the amount spent by "successful school" districts; (2) a regional cost index to ensure State aid could buy a comparable level of goods and services in districts around the state; (3) an expected minimum contribution by the local community; and (4) a pupil-need index recognizing added costs for providing extra time and help for students with special circumstances. R. 145–46 (¶ 43); App. Br. at 14-15.

In January 2007, then-governor Elliot Spitzer proposed a four-year "Educational Investment Plan" to implement these constitutional reforms. R. 144–45 (¶¶ 39, 41). The legislature overwhelmingly adopted the reforms, with a slight increase in the total funding level and other minor changes, by a vote of 60-1 in the Senate and 126-16 in the Assembly, as the Budget and Reform Act of 2007 (the "2007 Reform Act"), which is codified in N.Y. Educ. Law § 3602. R. 145 (¶¶ 41–42); *see* App. Br. at 14. (stating the 2007 Reform Act enacted the Foundation Aid Formula).

The 2007 Reform Act called for the State to increase Foundation Aid, which covers sound basic education costs, including teacher and principal salaries, and schools' basic operating costs. Specifically, the Act called for a $5.49 billion statewide increase in Foundation Aid, according to the following four-year phase-in:

School Year	Percentage of Total Funding	Amount
2007-2008	20%	$1.1 billion
2008-2009	22.5%	$1.24 billion
2009-2010	27.5%	$1.5 billion
2010-2011	30%	$1.65 billion

R. 146 (¶ 45).

III. Since the 2008 Recession, the State Has Abandoned Its Constitutional Reform Efforts and Has Further Cut and Frozen State Aid Without Responding to Actual Student Needs.

The State adhered to its constitutional reform efforts only for the 2007–2008 and 2008–2009 school years. App. Br. at 13, 16 (noting planned increases were implemented only in the 2007–2008 and 2008–2009 budgets). With the onset of the 2008 recession, however, faced with a "budget gap," the State reverted to an openly noncompliant system starting in 2009–2010. R. 132 (¶ 2); App. Br. at 16.

First, Foundation Aid was frozen at the level attained from the first two years of implementing the 2007 Reform Act. As Defendants concede, "[t]he Legislature eliminated a planned Foundation Aid increase for the 2009–2010 school year and extended the phase-in period for Foundation Aid from four years to seven years—thus delaying the time at which school districts would receive their maximum per-pupil allocation of Foundation Aid." App. Br. at 16.

The phase-in remains delayed to this day, a decade after the Foundation Aid Formula was enacted to calibrate funding with actual needs. For the upcoming 2017–2018 school years, the State-aid portion of school funding is approximately $3.7 billion less than the needs-based amounts called for by the Foundation Aid Formula's calculations. *See* Educ. Law § 3602.4; R. 147–49 (¶¶ 46–51), 151 (¶ 58).

In fact, this year, the governor recommended eliminating the Foundation Aid Formula, effective for the 2018–2019 fiscal year.[4] This recommendation was rejected by the legislature in the final budget bills for 2017–2018 enacted in early April 2017. The fact that the governor has proposed eliminating the Foundation Aid Formula, which has been statutorily retained but not honored for the past seven years, and that the legislature might in the near future eliminate it with no constitutionally-valid alternative system being put in its place, glaringly illustrates why it is essential that this Court expressly affirm the State must at all times follow a constitutionally-prescribed process in its school funding decisions.

[4] *See* N.Y. State Div. of Budget, FY 2018 N.Y. State Executive Budget: Education, Labor & Family Assistance Article VII Legislation 35:26–36:2 (2017), *available at* https://www.budget.ny.gov/pubs/executive/eBudget1718/fy18artVIIbills/ELFA_ArticleVII.pdf. According to the proposal, as of 2018–2019, further phase-in of the Foundation Aid Formula would be eliminated, and school districts would receive the Foundation Aid amount they received in 2017–2018 plus any additional amounts that political negotiations may deign to provide in future years.

Critically, before enacting any of its appropriation bills between 2009–2010 and the present, the State failed to account for whether new funding levels, billion-dollar reductions from what the Foundation Aid Formula called for, comport with the actual costs of providing a sound basic education. R. 132 (¶ 3), 149 (¶ 52), 177–79 (¶¶ 143–49), 180 (¶ 153). Nor did the State account for whether the legislation would undermine the education finance system by misaligning funding and actual student needs. *Id.*

What the State did do was adopt various statutory caps and mechanisms that purported to allow the hamstrung Foundation Aid Formula to exist in a state of suspended animation while appropriations were instead doled out by the "three men in a room."

The State enacted the Gap Elimination Adjustment ("GEA"), which is a euphemism for legislation that cut State education aid far below the levels directed by the 2007 Reform Act. Educ. Law § 3602.17. The "gap" is the difference between the money the State had estimated is constitutionally required and the money the State in a given year is willing to allocate from its total annual budget. R. 149 (¶¶ 52–53). The State also enacted a growth cap preventing State aid from annually increasing by more than the increase in personal income in the state for the previous year, regardless of constitutionally required funding levels. Educ. Law §§ 3602.1(dd), 3602.18; R. 150 (¶ 54). The State further enacted a

"supermajority" (60%) vote requirement that must be garnered before a local district can increase funding in excess of two percent of the prior year's levy or the increase in the national Consumer Price Index, whichever is less, regardless of the "actual costs" needed to provide students the expected local funding share for a constitutionally sufficient education. Educ. Law § 2023-a(2)(i); R. 150 (¶ 55). Finally, the State adopted school-aid penalty provisions tied to Annual Professional Performance Review plans ("APPR penalties") with no consideration for how reduced funding would impact a district's ability to cover the actual costs of a sound basic education. *See* Educ. Law § 3012.d.11; *see also Aristy-Farer* Compl. ¶ 44 (R. 17–18). A $290 million APPR penalty was imposed on top of the other reductions that had been made from the constitutional Foundation Aid amounts) on New York City in 2013–2014 without any consideration of the impact on student need. *See id*; *NYSER* Compl. ¶ 131 (R. 174–75).

IV. Supreme Court Properly Denied Defendants' Motions to Dismiss.

A. *NYSER*

NYSER's first cause of action (R. 190–91) alleges, *inter alia*, that in violation of this Court's orders in *CFE*, New York City schoolchildren cannot receive the opportunity to obtain a sound basic education because the State has abandoned a needs-based funding methodology, and has enacted statutes that cut State aid, disregarding funding levels the State, through a constitutional process,

had determined to be necessary to ensure a constitutionally compliant system. It also alleges that New York City students have not received even the minimum $1.93 billion discussed in *CFE III*.

The second cause of action (R. 191–93) alleges, *inter alia*, students in districts statewide are harmed by the State's aforementioned conduct because the education finance system's defective design—its failure to adhere to a needs-based funding process—intrinsically prevents the State from "ensuring" the system is even capable of providing all students with the constitutionally required opportunity. It also alleges that the State has not, in fact, provided students throughout the state a minimum constitutional level of funding necessary to ensure them the opportunity for a sound basic education.

The third cause of action (R. 193–94) alleges, *inter alia*, Defendants have failed in their self-executing duty to maintain a constitutionally compliant education finance system that appropriately accounts for changing educational and economic circumstances, including an appropriate accountability system.

The fourth cause of action (R. 194) alleges, generally, that Defendants' conduct following *CFE III* violates the right of all students in New York to be provided the opportunity to obtain a sound basic education.

Supreme Court denied Defendants' motions to dismiss the *NYSER* Complaint, accepting Plaintiffs' theories concerning statewide violation of the Education Article. R. 126–30.

B. *Aristy-Farer*

The first cause of action in *Aristy-Farer* (R. 28) alleges, *inter alia*, that the underfunding of New York City public schools—namely, the $290 million APPR penalty improperly based on the City's and its unions' inability to timely agree on a personnel evaluation system—violates the Education Article.

The second cause of action (R. 28–29) alleges, *inter alia*, that imposition of the $290 million APPR penalty while alternative mechanisms were available constitutes a violation of Plaintiffs' due process rights under the state Constitution.

The third cause of action (R. 30) alleges, *inter alia*, that imposition of the penalty on students in New York City but not on similarly-situated students in other school districts violates the plaintiffs' right to equal protection under the state Constitution.

Supreme Court denied Defendants' motion to dismiss the *Aristy-Farer* Complaint. R. 4–7.

V. The First Department Affirmed Denial of Defendants' Motions to Dismiss.

A. *NYSER*

The First Department consolidated decision on the State's appeals into a single order issued September 8, 2016, affirming denial of the State's motions to dismiss Plaintiffs' Complaints nearly in full.

The lower court correctly observed that through the 2007 Reform Act and its Foundation Aid Formula, "the State promulgated a four-year plan to implement the constitutional reforms" directed by *CFE*. R. 366. The court further correctly observed that thereafter, "[t]he State froze Foundation Aid levels, eliminating the planned increases for 2009–10," and then "went further" by suppressing or reducing the Foundation Aid's calculated funding through various legislative acts. R. 367.

The court fully upheld the *NYSER* Plaintiffs' first, second, and fourth causes of action, effectively concluding they each independently stated Education Article claims.

Concerning New York City schools, the First Department correctly noted that *CFE III* found those schools would require at least $1.93 billion in additional spending to meet the constitutional standard. R. 378. However, the court incorrectly found that *CFE III* had fixed—before the executive and legislature

reached agreement through the 2007 Reform Act—$1.93 billion as a constitutional "floor." R. 377.

Concerning the second and fourth causes of action, the Court notably rejected Defendants' argument that an Education Article claim seeking correction of a straightforward funding process defect would require proof of educational deficiencies in each of New York's 700 school districts. R. 383. Responding to Plaintiff NYSER's allegations that funding inadequacies have impacted students in New York City, Syracuse, and the other school districts, the court held "it is enough that the plaintiffs have adequately alleged systemic deficiencies in at least one or two districts—New York City and Syracuse," R. 384, because, "[a]s a practical matter, actionable deficits identified in one district will require modification of the formula, necessarily affecting calculation of funding for all districts." R. 383. That is because "[t]he State educational funding system is an interconnected web in which a complex formula is used to calculate funding for all districts." *Id.*

The Appellate Division did not discuss Plaintiff NYSER's primary Education Article theory, that the State must first fulfill its self-executing ascertainment and allocation duty aligned with what students actually need to obtain the constitutional standard of education. The court did, however, fully

uphold the second and fourth causes of action, which encompass that theory. R. 389.

The lower court validated *NYSER*'s third cause of action almost in its entirety. The court found "the parties dispute the adequacy of accountability mechanisms in light of the significant funding adjustments over the 10 years since *CFE III* was handed down," and "[t]hus it would be premature to foreclose plaintiffs from exploring the adequacy of accountability mechanisms." R. 385. The court further noted that, "[i]ndeed, the adequacy of the State's education funding accountability mechanisms is directly related to the State's funding duty." *Id.* However, the court rejected the "information and guidance" component of the third cause of action, finding it is "not sufficiently related to the State's funding duty." *Id.* Plaintiffs do not cross-appeal dismissal of that aspect of the third cause of action.

B. *Aristy-Farer*

The court fully upheld the *Aristy-Farer* Complaint's first cause of action, concluding it stated a valid Education Article claim for the same reasons that support the *NYSER* Plaintiffs' second and fourth causes of action. R. 379. The court rejected Defendants' argument that an Education Article claim requires a plaintiff to plead deficiencies in every New York School district. R. 383–84.

The court dismissed the *Aristy-Farer* Plaintiffs' second and third causes of action, a decision Plaintiffs do not cross-appeal. R. 386–88.

ARGUMENT

POINT I

THE STATE HAS A THRESHOLD DUTY TO DEVELOP AND MAINTAIN A FUNDING PROCESS THAT COMPLIES WITH CONSTITUTIONAL REQUIREMENTS.

I. The State Cannot "Ensure" a Constitutionally-Compliant System Without a Process That Fully Funds the "Actual Costs" of a Sound Basic Education in a Manner Aligned with Student Need.

A. The State Has a Threshold Duty to First Ascertain and Then Fully Fund Actual Costs to Adequately Educate All Students.

This Court has repeatedly confirmed that the Education Article makes it the State's responsibility to "ensure" a constitutionally compliant education system for all schoolchildren. *See supra* pp. 13 & 17, quoting *CFE I, II, & III*; *see also New York Civil Liberties Union v. State* ("*NYCLU*"), 4 N.Y.3d 175, 182 (2005) ("education is ultimately a responsibility of the State" notwithstanding any 'sabotage' by local school districts").

To satisfy its obligation, the State must first ascertain and fully fund its share of the estimated "actual costs" of providing all students with the opportunity to obtain a sound basic education based on student need. If this threshold duty is not fulfilled, the State cannot represent its system as being capable of meeting the

constitutional standard. It certainly cannot "ensure" the standard is actually satisfied without first properly calculating and then fully funding its share of the costs needed to meet the standard.

Plaintiffs therefore ask the Court to expressly affirm that the State has this threshold ascertainment and allocation duty concerning all students in New York, not just for schoolchildren in New York City. Such a judicial affirmation is needed to ensure that Defendants will always adhere to an actual-cost, needs-based funding process, whether it is the Foundation Aid Formula or some other constitutionally sufficient equivalent.

New York's education finance framework has three interdependent points: (1) the starting point—the State's funding process that calculates and allocates what the State has estimated to be constitutionally sufficient funding based on "actual costs" needed to meet the standard; (2) the middle point, which is the school district "vehicle" responsible for receiving and using State funding; and (3) the end point, which is the students for whom the State must provide the opportunity to obtain a sound basic education.

The State at the starting point is the lynchpin of the system. If local districts are the vehicle, then the State is the driver who must determine how much fuel (funding) is needed to reach the target destination—the opportunity to obtain a sound basic education. The State cannot "ensure" that destination can be reached

without first estimating how much fuel the vehicle needs, and ensuring it is available.

This is common sense, and it is why Plaintiffs have not, contrary to Defendants' mischaracterization, taken the approach of piecemeal litigating "Education Article claims against every school district in the state." App. Br. at 37. Education Article claims are brought to rectify unconstitutional conduct by the State, not school districts, and here the remedy will at least entail first compelling the State to correct the threshold defect evident in its funding process. Proceeding with a case to prove current educational deficiencies in 700 school districts would, among other things, at this stage put the cart before the horse, because the State has openly declined to fully fund its previous estimate of "actual costs" needed to meet the constitutional standard. *See supra* pp. 21–24. This Court has already confirmed the logical order of operations, which applies broadly and beyond the limited context of *CFE II*: "Once the necessary funding level is determined, the question will [then] be whether the inputs and outputs improve to a constitutionally acceptable level." *CFE II*, 100 N.Y.2d at 930 (emphasis added).

B. The State's Threshold Duty Ties to Its Process, Not to a *Per Se* Sum-Certain.

Defendants argue "allegations that the State has not provided funding in a given amount cannot establish a *per se* failure to provide the educational opportunities the Constitution requires, without consideration of (a) whether the

level of funding has caused a deficiency in educational services, and (b) whether funding from other sources may combine with state funding to satisfy the constitutional requirement." App. Br. at 54. Their argument is wrong and misses the mark for at least two reasons.

First, Plaintiffs allege that the State has failed to follow a constitutionally-compliant funding process that provides State aid based on what the State determines is actually needed to meet the constitutional standard. The claims are not for any absolute amount of money that is required *per se*. If the State believed that changed circumstances in 2009—or now—justified undertaking a new process for determining "actual costs," which might have been different from the amounts called for in the Foundation Aid Formula, it would have been entitled to do so, and to then fully allocate those ascertained amounts. But here the State had previously calculated the "actual costs" but refused to fully fund them, and has made no effort to undertake any process to ascertain the current actual costs. Thus, the State is failing to ensure "the educational opportunities the Constitution requires." *Id*. The State's duty is to ascertain the "actual costs" needed "to provide the educational opportunities the Constitution requires." App. Br. at 54. If it does not fulfill the duty to calculate that particular "given amount," *id.*, the State does fail to "ensure" its provision of the constitutional opportunities.

Plaintiffs acknowledge that the Foundation Aid Formula's funding levels may not reflect what is actually needed now, a decade after it was adopted. The State's constitutional duty, however, is to adhere to the Foundation Aid Formula it enacted in 2007 until it has undertaken a valid deliberative analysis of current "actual costs," and established an alternative method for fairly and fully distributing its share of that amount to all school districts. Failure to do so violates the Education Article.

Second, "whether funding from other sources may combine with state funding to satisfy the constitutional requirement," App. Br. at 54 (emphasis added), does not measure whether the State has fulfilled its own duties. Variable and indiscriminate monies that might be received from other sources in any given year, of course, "may"—or may not—be applied to fund school districts in an amount that could theoretically provide the opportunity to which students are entitled. But mere hope by the State that happenstance funding from other sources might substitute for its own share of State education aid does not "ensure" the education finance system is constitutionally compliant.

Significantly, the constitutional command is that "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Const. art. XI § 1 (emphasis added). Following this mandate, the legislature enacted the Foundation

Aid Formula to ensure the amounts needed to provide all students in the state the opportunity for a sound basic education based on specific amounts of state and local funding; the Formula nowhere factors or even mentions any possible federal funding.

Defendant Regents have conceded the State cannot rely on funds that may, or may not, be received from the federal government to fulfill its duty. This was made clear during *CFE*:

> [F]unding education is a State responsibility, [and] . . . [m]ost federal funds can be used only to supplement, not supplant, a state's commitment to education.[5]

Reliance on the vagaries of funding received from non-State sources in any given year, which is what Defendants advocate, falls far short of the State's constitutional obligation to "ensure a system" designed to comply with the Education Article.

C. The Threshold Calculation and Funding Duty is a Well-Recognized First Principle in States Across the Country.

New York will be far from the first state to expressly affirm that the threshold step toward providing a constitutionally sufficient education for all students is first ascertaining the estimated actual costs needed to do so, and fully funding those costs.

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[5] Memorandum of Law on Behalf of Amicus Curiae New York State Board of Regents at 18 (Sup. Ct. N.Y. County Index No. 111070/93) (emphasis added).

By expressly recognizing this threshold self-executing duty, the Court would align New York with many other states. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 220 S.W.3d 645, 654–55 (Ark. 2005) ("Without a continual assessment of what constitutes an adequate education . . . the General Assembly is 'flying blind' with respect to determining what is an adequate foundation-funding level."); *McCleary v. State*, 269 P.3d 227, 254 (Wash. 2012) (rejecting as backwards the state legislature's characterization of adequate education as whatever their funding formula provided, stating that "[i]f the State's funding formulas provide only a portion of what [basic education] actually costs . . . then the legislature cannot maintain that it is fully funding basic education"); *Campbell Cty. Sch. Dist. v. State*, 181 P.3d 43, 49–50 (Wyo. 2008) (noting the court's mandate that the state revise its cost-based model every five years); *Conn. Coal. for Justice in Educ, Inc. v. Rell*, No. X07HHDCV145037565S, 2016 WL 4922730, at *5–6, 17 (Conn. Super. Ct. Sept. 7, 2016) (unpublished) ("The important thing is that whatever rational formula the state proposes"—like the Foundation Aid Formula—"must be approved and followed. If the legislature can skip around changing formulas every year, it invites a new lawsuit every year.") (applying *Conn. Coal. for Justice in Educ., Inc. v. Rell*, 990 A.2d 206 (Conn. 2010)); *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 749 (N.H. 2002) (acknowledging the state's characterization of "four mandates" for its education-funding process: "define an adequate education,

determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability") (internal citation and quotation omitted).

POINT II

THE FOUNDATION AID FORMULA WAS THE STATE'S ONLY ATTEMPT TO FOLLOW A NEEDS-BASED STATEWIDE FUNDING PROCESS AND IS THE PROPER FOCUS OF PLAINTIFFS' COMPLAINTS.

A. The Foundation Aid Formula Was Not a Gratuitous Undertaking.

Plaintiffs' allegations depict an unmistakable course of events flowing directly from the findings and holdings of *CFE*. At bottom, *CFE* for the first time guided the State on efforts needed to meet its statewide Education Article obligations, and the State rationally attempted to comply by enacting the Foundation Aid Formula.

CFE III expressly acknowledged that the State had then already responded to *CFE II* by initiating efforts to attain constitutional compliance through a statewide funding process. *CFE III*, 8 N.Y.2d at 21–22. The State proceeded in this manner because, although *CFE II* explicitly ordered the State to ascertain the "actual costs" only for New York City, the Court implicitly made clear that funding for all other districts could be constitutionally compliant only if "actual costs" were ascertained for those as well. No other interpretation of *CFE II* is plausible—if funding based on "actual costs" was required for New York City schools, the same fundamental principle must be true for all schools statewide.

Governor Pataki, the legislature and the Regents all assumed in their immediate responses to *CFE II* that that the entire statewide funding system, and not just the manner in which New York City had been funded, did not meet constitutional requirements. *See supra* pp. 17–18. The governor appointed a commission to consider actual costs statewide, the Regents undertook a statewide cost analysis, and the legislature considered adoption of major statewide funding costs.

Following this Court's *CFE III* decision, the State re-considered the issue of "ascertain[ing] the actual cost of providing a sound basic education," *CFE II*, 100 N.Y.2d at 930, not only for New York City, but also for the state at large. The Regents recommended an updated funding allocation methodology—the Foundation Aid Formula—that calibrated funds distribution with need, as the Court of Appeals had mandated. The "Regents Proposal on State Aid to School Districts for 2007–08," incorporated into NYSER's Complaint,[6] explains in detail the process and methodology the SED followed for its costing-out work. The robust explanation, detailed in a section entitled "Estimating the Additional Cost of Providing an Adequate Education,"[7] leaves no doubt what the State intended to

[6] R. 143-144, ¶ 38, *available at* http://www.p12.nysed.gov/stateaidworkgroup/2007-08RSAP/rsap0708.pdf.

[7] *See id.* at 44 ("The purpose of this report is to describe the methodology that was used to estimate the likely additional expenditures needed by districts with lower

accomplish. The SED explained it was calculating its estimate of the additional funds needed to provide a "sound basic education" under the conditions existing at that time, and not the costs of an aspirational education in excess of a "sound basic education."[8] The State Education Department revisited its cost analysis, updated the definition of "successful schools," and rejected the very low weightings for children from poverty backgrounds and for English language learners that had been the major determinants of the low $1.93 billion and $2.45 billion figures that Gov. Pataki had recommended.

Accordingly, the Foundation Aid Formula and the 2007 Reform Act were not merely "state support for public education in New York" (App. Br. at 13); they were the culmination of a major deliberative process that had been explicitly undertaken to achieve constitutional compliance. The State wisely did not shun the

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academic performance to achieve educational outcomes that demonstrate that an adequate education is being provided.").

[8] *See id.* at 52:

> The notion of an adequate education implies one that provides all students with the opportunity for a sound basic education, not one that goes beyond this particular standard. As Justice DeGrasse explains in his [CFE] decision, 'the Education Article requires a sound basic education, not one that is state of the art.' He further explains that 'the Court repeatedly used the terms 'adequate,' 'basic,' and 'minimally adequate' to describe the education to be provided to the State's public school students (State Supreme Court Decision,[ ]719 N.Y.S.2d 475, January 9, 2001, p.15).

needed statewide reform efforts simply because *CFE II's* express remedy was limited to New York City.

In January 2007, "to provide a statewide solution to the school funding needs highlighted by the Campaign for Fiscal Equity Law Suit," Governor Spitzer issued an Executive Budget that proposed a four-year "Educational Investment Plan" that adopted the Regents' Foundation Aid Formula and proposed substantial funding increases not only for New York City, but for school districts throughout the state.[9] As Governor Spitzer acknowledged, "[t]he Foundation Aid formula was proposed and enacted as a direct result of the CFE litigation. As contentious as school funding debates had often been, there was agreement that Foundation Aid was a principled and constitutionally mandated step forward." Eliot Spitzer, *Fully Fund Foundation Aid for New York's Public Schools*, ALBANY TIMES-UNION, Feb. 15, 2017, available at http://www.timesunion.com/tuplus-opinion/article/Fully-fund-Foundation-Aid-for-New-York-s-public-10935315.php.

The Legislature also clearly understood that it was designing state-wide reforms to ensure the entire state-wide education finance system complied with the constitutional requirements the Court of Appeals had delineated in the *CFE* litigation:

[9] Paragraph 39 of the Amended Complaint incorporates the "Educational Investment Plan," contained in the 2007–2008 Executive Budget, Investing in Education, which is electronically available at http://www.budget.ny.gov/pubs/archive/fy0708archive/fy0708littlebook/Education.html.

> The State Budget adopted for the 2007-08 school year provided a . . . State response to the Campaign for Fiscal Equity (CFE) court decision. Along with satisfying the court's decision, this settlement . . . adequately fund[s] our public school system so that all public school students have access to a sound basic education . . . .[A] new Foundation Aid formula . . . satisf[ies] the requirements of the CFE court decision.

Assembly Committee on Education's 2007 Annual Report, introductory letter at p. 1, report at p. 2, available at http://assembly.state.ny.us/comm/Ed/2007Annual/report.pdf.

The Regents also specifically reiterated that the primary purpose of the new Foundation Aid Formula was to provide "adequate funding for a sound basic education in response to the Campaign for Fiscal Equity decision." New York State Board of Regents, Proposal on State Aid to School Districts For School Year 2012–13, 7.[10]

The *NYSER* Complaint thus properly pleads a straightforward violation of the Education Article, in part by alleging the State's open abandonment of its only

[10] The State's only response to these unanimous contemporaneous statements of all the state's policymakers is to cite a 2007 press release for the proposition that the 2007 Budget and Reform Act included "*more than sufficient funds* to address the school funding needs highlighted by the *Campaign for Fiscal Equity* law suit." (App Br. at 51). The press release itself belies that interpretation because it lists over $400 million in funding *on top of* the foundation aid that the governor was proposing for Year one of the phase-in.

attempt to implement a process-based funding methodology of statewide application.

B. The Foundation Aid Formula Did, Properly, Go Beyond the Amounts Proposed by Gov. Pataki.

Defendants' argument that the Foundation Aid Formula, if fully funded, would have provided more funding than had been advocated by Governor Pataki is misplaced and has no bearing on the Foundation Aid Formula's constitutional significance. *See* App. Br. at 15, 51 (characterizing the Foundation Aid Formula as "more generous" than what was considered at the time of *CFE III*). Post-*CFE III*, Governor Spitzer and the legislature simply concluded after a thorough ascertainment of actual needs-based costs that a funding level closer to the higher end of the permissible range of figures endorsed by the Court would be appropriate. Responding to this Court's decision in *CFE III*, Governor Pataki had proposed a funding plan to the legislature, but it refused to adopt it, and the impasse precluded the state from adopting legislation needed to fulfill the constitutional obligations. *See CFE III*, 8 N.Y.3d at 35 (Kaye, C.J., dissenting) ("The enactment of an appropriation bill that ensures adequate education funding requires agreement among the Governor and both houses of the Legislature, and plainly that has not occurred."). That impasse precipitated another round of litigation.

The Appellate Division considered and modified the trial court's order that had accepted the recommendation of a panel of judicial referees for a $5.63 billion increase for New York City schools, phased in over four years. Its modification allowed the governor and legislature to break their impasse by considering a range of reasonable estimates of the "actual cost" of a sound basic education for New York City students. Directing the parties to overcome their impasse, the Appellate Division made clear that the operative effort to attain constitutional compliance would only arrive through eventual agreement by the governor and the legislature in the form of legislation. The order provided as follows:

> [W]hile the Legislature should consider the Governor's proposal to increase annual funding by $4.7 billion, together with the Referees' recommendation that $5.6 billion per year is the preferable amount to expend, in the final analysis, it is for the Governor and the Legislature to make the determination as to the constitutionally mandated amount of funding . . . .
>
> [T]his directive does not merely urge the Governor and the Legislature to consider taking action. They are directed to take action. The matter for them to consider is whether $4.7 billion or $5.63 billion or some amount in between is the minimum additional funding to be appropriated for the city schools.

CFE v. State, 29 A.D.3d 175, 189 (1st Dep't 2006) (emphasis added).

This Court accepted the Appellate Division's call for a range of permissible figures, but modified the number at the lower end of the range because it determined that the $4.7 billion figure adopted by the Appellate Division included projected federal aid, local matching funds, and other items that exceeded the

minimum figure that the governor had actually advocated. *CFE III*, 8 N.Y.3d at 24. This Court found that the governor had actually called for only a $1.93 billion sound basic education increase for New York City. *Id.* This was the lowest figure in a range that Standard and Poor's had found to be reasonable, the difference largely being explained by the extent of the extra weightings given for poverty, English language learning, and other factors, and methods for calculating cost of living factors. *Id.* at 24, 31.

As modified, *CFE III*'s final directive was that in the process of reaching an agreement by legislation, the governor and legislature should consider at least $1.93 billion, and at most $5.63 billion, in additional funding for New York City schools, but "in the final analysis it was for the Governor and the Legislature to make the determination as to the constitutionally required amount of funding. *See supra* p. 43. Accordingly, *CFE III* did not set forth an immutable constitutional "magic number" of $1.93 billion.

Following *CFE III*, with further refinement and consideration of the SED's cost analysis recommendations, the Regents and then-Governor Spitzer were able to convince the legislature that the Regents' Foundation Aid Formula and its greater calculations of the needs of at-risk students, rural students, and others, approximated what the legislators rationally considered to be constitutionally required both for New York City and districts in the rest of the state. As part of

this statewide process, the executive and legislature considered the Court's $1.93 billion figure for New York City, but they decided more would be constitutionally appropriate for the city given the Regents' Foundation Aid Formula.

C. If the Foundation Aid Formula Was Not a Constitutional Response to *CFE*, the State Would Be Admitting It Has Never Complied With Constitutional Requirements.

Defendants argue the Foundation Aid Formula has no constitutional significance to the extent it directed provision of statewide funding beyond the $1.93 billion *CFE III* endorsed for New York City schools.[11] If that were true, it would signify that the State has never even attempted to design and implement a needs-based funding process for statewide application. This appeal provides the opportunity for the Court to confirm that the State is required to do so.

POINT III

DEFENDANTS' 700 DISTRICT INPUTS-OUTPUTS-CAUSATION ARGUMENT IS IRRATIONAL, UNWORKABLE, AND NOT LEGALLY REQUIRED.

A. The State's Position Is Illogical.

For all the reasons explained above, *supra* at pp. 30–36, the State must first satisfy its threshold duty to fully fund the estimated "actual costs" needed to

[11] Plaintiffs allege students in New York City have not even received this minimal funding level, calculated in accordance with appropriate cost of living and regional cost adjustments since 2006. R. 152, (¶ 62), R. 190, (¶ 191(a)). The lower court found this to be a question of fact.

provide the opportunity for a sound basic education. Only then would it be appropriate for plaintiffs from any particular district to use the inputs-outputs-causation approach to test whether the State's funding estimates satisfy the constitutional standard. It would be patently irrational to make students assess the sufficiency of funding in any district, let alone in all 700, before the State has even purported to ascertain and fully fund its portion of the costs needed to attain the constitutional standard in all districts statewide.[12] Doing so would needlessly tax the capacity of New York's court system, as well as both Plaintiffs' and Defendants' resources, when all the State must do at the present stage is fulfill its self-executing threshold funding duty.

Accepting Defendants' position would give judicial imprimatur to an education finance system in which the State would be required to take the prerequisite first steps toward constitutional compliance only after litigation and proof that whatever level of funding the State happened to have provided at the time was insufficient. And surely the State is not authorized to undertake efforts toward constitutional compliance for a brief moment in time only to shortly thereafter abandon those efforts and revert to business as usual until schoolchildren again seek relief from the courts. That result would improperly make it plaintiffs'

[12] Plaintiffs are aware of no state, and Defendants cite none, that has ever required plaintiffs to provide evidence of inputs and outputs for every district in the state to fix a structural defect in its education finance system.

and the courts' obligations in both the first and the last instance to "ensure" New York's education finance system complies with the Education Article.

Most importantly, that result would infringe the constitutional rights of generations of children.

B. Defendants' Position Is Neither Required Nor Supported by the Law.

New York law should not be read to preclude an Education Article claim challenging the State's failure to fulfill its threshold funding ascertainment and appropriation duty. Plaintiffs' allegations may appear novel compared to the district-focused approach taken by prior Education Article plaintiffs, and thus reflected in the case law, but Plaintiffs' claims fit comfortably within existing Education Article precedent.

Indeed, none of the Court's past Education Article cases addressed the State's unabashed refusal to in the first instance fully fund its own ascertained estimate of funding needed to provide a constitutionally sufficient education. Plaintiffs' Education Article claim is thus not at all inconsistent with those cases, and is an equally viable action under the Education Article.

In *Paynter v. State*, African-American students in the Rochester Central School District ("RCSD") sued the State seeking relief concerning only their district. 100 N.Y.2d 434 (2003). They alleged the Education Law's resident and non-resident tuition requirements caused poverty concentration and racial isolation

that decreased student performance in their district. *Id.* at 438-39. The RCSD students claimed it was the "State's responsibility to change the school population until the results improved." *Id.* at 441. The claim failed because, unlike here, it in no way concerned the State's funding system. *Id.* at 438-39. *Paynter* in no way precludes Plaintiffs' claims here.

In *NYCLU*, plaintiffs brought claims concerning alleged educational deficiencies in 27 schools. 4 N.Y.3d 175, 179 (2005). The plaintiffs wanted the State to work directly with those schools, not with the school districts, to remedy the purported failings. *Id.* at 178-79. The claim was dismissed because plaintiffs had not "articulate[d] . . . the asserted failings of the State," and because working directly with individual schools would bypass local districts and "subvert local control." *Id.* at 180, 181–82. In the present case, Plaintiffs clearly articulate the "failings of the State," and do not ask the State to bypass local school districts. Just the opposite, Plaintiffs ask the Court to hold the State directly accountable for its glaring abdication of its constitutional duty.

In *New York State Association of Small City School Districts, Inc. v. State*, 42 A.D.3d 648 (3d Dep't 2007), a standing case, plaintiffs challenged the amount of funding the State's education finance system had allocated to 18 small city school districts. The complaint did not challenge the nature of the State's funding process or its impact on the other approximately 682 districts in the state. Indeed,

the Third Department explicitly emphasized that plaintiffs' "complaint . . . does not address any specific defects or illegalities in the State's methodology in allocating funds." *Id.* at 650.

Nor does the First Department's decision in *New York City Parents Union v. Board of Education,* 124 A.D.3d 451 (1st Dep't 2015), support Defendants' position that an Education Article challenge cannot focus on conduct at the structural, statewide level. There, plaintiff failed to state an Education Article claim because it did not allege a districtwide, let alone statewide, failure in simply alleging "traditional public school students" received an education "inferior to that provided to co-located charter school students." *Id.* at 451.

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In sum, Plaintiffs' right to challenge the State's conduct here is not foreclosed by the case law. As explained below, not only has this Court left the door open to variations on how an Education Article claim may be pleaded, it has explicitly anticipated challenges to the State's education finance system at the structural level.

C. The Court of Appeals Has Authorized, Not Foreclosed, Plaintiffs' Ability to Plead an Education Article Claim by Challenging Structural Defects in the State's System.

This Court has not dictated *CFE*'s inputs-outputs-causation model as the only way to plead an Education Article claim. Nor has it circumscribed the limits

of how plaintiffs can conceivably challenge the State's conduct in relation to the Education Article. On at least two occasions, this Court indicated New York courts have yet to flesh out the full contours of such claims. And on a third occasion, it acknowledged plaintiffs may plead a claim based on the Education Article by challenging structural defects in the State's education finance system.

1. *Paynter*. Defendants contend *Paynter* holds that the only conceivable way to state an Education Article claim is with the district-centric inputs-outputs-causation analysis used in *CFE*. See First Dep't Appellants' Br. at 19, 20, 21, 27. But *Paynter* stands for the opposite notion:

> [A]s a logical and jurisprudential matter, we recognize that in CFE I we addressed the sufficiency of the pleadings then before us and had no occasion to delineate the contours of all possible Education Article claims.

Paynter, 100 N.Y.2d at 441 (emphasis added); *see CFE I*, cited *supra* p. 13. *Paynter* expressly framed the inputs-outputs-causation test as simply "the elements of the CFE plaintiffs' viable Education Article claim" in that particular case. *Paynter*, 100 N.Y.2d at 440.

2. *NYCLU*. Defendants likewise assert *NYCLU* holds an Education Article claim must focus only on districts. First Dep't Appellants' Br. at 21, 23, 25, 26. But again, that is not *NYCLU's* rule. The *NYCLU* court plainly acknowledged the boundaries of an Education Article claim had not yet been formed. 4 N.Y.3d 175. The Court there declined to "explore those contours" only

because, as discussed *supra* p. 48, the *NYCLU* plaintiffs did not even allege defects in the State's funding system, could not identify specific failings of the State, and wanted the State to work directly with individual schools to fix them. *Id.* at 180 & n.2, 182.

3. *Reform Educational Financing Inequities Today (R.E.F.I.T.) v. Cuomo*, 86 N.Y.2d 279 (1995). Plaintiffs in *R.E.F.I.T.* sought a declaration that "New York's system for financing its public elementary and secondary schools [wa]s unconstitutional." 86 N.Y.2d at 283 (emphasis added). Plaintiffs alleged "the statutory scheme by which New York finances its public schools violates the Education Article." *Id.* (emphasis added). They further alleged the Court of Appeals' decision in *Board of Education*, *Levittown Union Free School District v. Nyquist*, 57 N.Y.2d 27 (1982), had "left the door open for a challenge to the constitutionality of the educational financing structure." *R.E.F.I.T.* at 284.

Although the Court affirmed dismissal of the claim which updated allegations of equal protection violations that had been rejected in *Levittown*, it pointedly modified the Appellate Division's affirmance to indicate future plaintiffs could plead an Education Article claim by directly challenging defects in the State's funding scheme. The Court "modif[ied] to declare that the school financing scheme of the State of New York has not been shown in this case to be unconstitutional." *Id.* at 285 (emphasis added).

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For these reasons, this Court's precedents support, not foreclose, the structural, statewide claims alleged in the Amended Complaint.

POINT IV

SEPARATION-OF-POWERS PRINCIPLES SUPPORT PLAINTIFFS' CLAIMS AND SHOW THAT *CFE III* SIMPLY ENDORSED A PARTICULAR ESTIMATE TO BE CONSIDERED BY THE ELECTED BRANCHES.

Separation-of-powers principles align with Plaintiffs' claims. They also demonstrate why, before the executive and legislature had even agreed on an appropriate estimate, it would have been improper for *CFE III* to cement $1.93 billion as a fixed level of constitutional funding for New York City schools. Plaintiffs and Defendants agree that "[t]he primary responsibility for implementing the Education Article lies with the executive and legislative branches, especially with respect to public school financing." App. Br. at 45 (emphasis added).

Here, the State currently funds education with shares doled out by "three men in a room." That method violates the Education Article because it is not a process calibrated to the ascertained "actual costs" needed to provide all students with a constitutionally adequate education.

Accordingly, Plaintiffs' funding claims sit plumb in the realm of constitutional claims for which judicial intervention is most appropriate. *See* App. Br. at 46 (involvement by the judiciary "is justified only where deficiencies are so

acute, and the State's responsibility so clear, that it is appropriate for a court to intrude"). "Courts are, of course, well suited to . . . extrapolate legislative intent . . . [and are] also well suited to interpret and safeguard constitutional rights and review challenged acts of [thei]r co-equal branches of government—not in order to make policy but in order to assure the protection of constitutional rights." *CFE II*, 100 N.Y.2d at 931 (citation omitted). "That is what . . . [courts] have been called upon to do by litigants seeking to enforce the State Constitution's Education Article." *Id.*; *see also Levittown*, 57 N.Y.2d at 39; *Hussein v. State*, 19 N.Y.3d 899, 901 (2012) (Ciparick, J., concurring) (quoting *CFE II* and *Levittown*).

The judicial "safeguard" here is straightforward: Affirmation that the State must ascertain the "actual costs" to give all students the opportunity to obtain a sound basic education and then fully fund its portion based on what students actually need. Plaintiffs do not ask this Court to wade into the weeds of what particular needs-based funding process could be most appropriate for New York, whether it be the Foundation Aid Formula, some rational variation of the Formula, or some other methodology that Defendants through deliberative process might expeditiously implement.

And Plaintiffs' claims do not require the judiciary to order sum-certain appropriations over the heads of its coordinate branches. Defendants first must rationally design and fully implement a constitutionally-compliant funding process,

and whatever aid is directed by it will, naturally and without further court mandate, be distributed to the benefit of all districts. Once such a process is designed and implemented, it would then properly be in the judiciary's purview in a proper case to review whether the amount of funding designated by that process is rational. *CFE III*, 8 N.Y.3d at 27 ("The role of the courts is not . . . to determine the best way to calculate the cost of a sound basic education . . . , but to determine whether the State's proposed calculation of that cost is rational."); *see also CFE III*, 8 N.Y.3d at 35 (Kaye, C.J., dissenting) ("When the Executive and Legislature have acted together on matters within their particular province, the courts should indeed tread lightly.").

This proper order of events and judicial deference to decisions that must first be made by the executive and legislature shows why *CFE III* could not have cemented a minimal level of constitutional funding for New York City before the executive and legislature had agreed on an appropriate amount. In their determination, the executive and legislative branches could not go below $1.93 billion for New York City, but that does not mean they could not rationally decide more was constitutionally required.

Moreover, Defendants misstate Plaintiffs' allegations as construing the Foundation Aid Formula and 2007 Reform Act to "set a constitutional norm binding on future lawmakers." App. Br. at 52. Plaintiffs do not contend the

Foundation Aid Formula is the only possible mechanism through which the State can fulfill its constitutional funding process obligations, and thus also do not contend subsequent legislatures have no power to deviate from the Foundation Aid Formula—so long as their deviation is determined through a process that is consistent with what the Education Article requires.

POINT V

SUPPOSED FISCAL CONSTRAINTS CANNOT ABRIDGE STUDENTS' RIGHTS TO A CONSTITUTIONAL LEVEL OF FUNDING.

Plaintiffs pled that the State's education finance system violates the Education Article because the State has enacted various obstacles to prevent districts from receiving, or generating, the full amount of needs-based education funding the State had identified. *See supra* pp. 21–24. All education funding legislation must comply with the constitutional requirement that funding be established and fully allocated based on the amount the State determines is actually needed in districts statewide. The GEA and the other statutory contrivances cited *supra* pp. 21–24 do not meet that requirement. They reduce or suppress education funding solely on the basis of fiscal constraints.

Settled New York law forecloses Defendants' rationale that "revenue constraints caused by ongoing economic difficulties" could ever justify abandoning a constitutionally compliant education finance system. *See* First Dep't Appellants' Br. at 11–13; *see also, e.g.*, *Sloat v. Bd. of Exam'rs of Bd. of Educ. of City of N.Y.*,

274 N.Y. 367, 370 (1937) ("Disobedience or evasion of a constitutional mandate may not be tolerated even though such disobedience might, perhaps, at least temporarily, promote in some respects the best interests of the public."). No matter how real or dire, fiscal considerations never justify curtailment or delay of constitutional rights.

In *Sgaglione v. Levitt*, 37 N.Y.2d 507, 511 (1975), which pitted "the obviously compelling and urgent stringency with which the city and State [we]re faced" against the state constitution's non-impairment clause, (emphasis added), this Court concluded the New York State Financial Emergency Act was unconstitutional and the legislature was "powerless" to abridge public employees' constitutional rights notwithstanding the dire straits faced by the city and the State. The Court "was not at liberty to hold otherwise," even if the "system will be plunged into bankruptcy." *Id.* at 512, 514.

In *Flushing National Bank v. Municipal Assistance Corporation for the City of N.Y.*, the Court again rejected the fiscal hard-times defense where the Emergency Moratorium Act delayed creditors' rights under the "faith and credit" clause of the state constitution. 40 N.Y.2d 731, 741, (1976). As in *Sgaglione*, the court easily rejected the "insufficient funds" defense, even at the risk of potential

national disaster. *Id.* at 736, 739 ("The portrait [of dire straits] is a correct one, but the duty of this court is to determine constitutional issues . . . .").[13]

Sgaglione and *Flushing National Bank*, which resoundingly rejected the "fiscal hard times" defense to constitutional violations, compel rejection of that same infirm rationale here.

Plaintiffs are not insensitive or naïve regarding difficulties faced by the State in balancing a complex budget. But students' constitutional rights cannot be violated on that basis. Balancing a budget and ensuring constitutional rights are not mutually exclusive outcomes, even in difficult economic times. The State could, for example, reassess certain of its mandates imposed on school districts, or work with districts to develop cost-effective methods to accomplish more with less funding from the State. The relevant end result under the Education Article is attaining the constitutional standard of education, not providing any given sum-certain amount of education aid to districts. What the State cannot do, however, is cut or suppress education aid by arbitrary legislative acts that fail to consider the ascertained actual costs of providing students with the opportunity to obtain a sound basic education.

[13] The Court has consistently reaffirmed that resource constraints provide no basis to excuse constitutional violations. *See Hurrell-Harring v. State*, 15 N.Y.3d 8, 11 (2010); *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537 (1984).

POINT VI

THE FIRST DEPARTMENT'S ORDER SHOULD BE AFFIRMED WITH APPROPRIATE MODIFICATIONS CLARIFYING THE STATE'S THRESHOLD CONSTITUTIONAL RESPONSIBILITIES.

A. The First Department Correctly Understood That Fixing the State's Funding Formula Automatically Inures to the Benefit of Students in All 700 School Districts.

The First Department acknowledged that New York has implemented a formula-based process to holistically ascertain funding for all districts, not one that determines funding piecemeal on an individualized district basis. *See supra* p. 28. The lower court correctly described "[t]he State's educational funding system [a]s an interconnected web in which a complex formula is used to calculate funding for all districts." R. 383. According to the court, any "modification of the [funding] formula" will "necessarily affect[] calculation of funding for all districts." *Id.*

But Defendants have declined to acknowledge practical application of the State's funding process, which is designed to rely primarily on a single, albeit complex, formula. As discussed above, Plaintiffs ask this Court to recognize that the State is not even purporting to fund its portion of ascertained "actual costs" needed to provide students with the constitutional level of education should be deemed sufficient to plead a violation of the Education Article. If the State is not fulfilling that threshold duty—whether by failing to first ascertain the actual costs calibrated with need, or to fully allocate them, or both—it cannot possibly be

operating a funding system even capable of ensuring the standard is actually being satisfied.

Perhaps because this Court has not yet expressly affirmed the State has a threshold constitutional duty to first ascertain and allocate the "actual costs," the Appellate Division seemingly overlooked that Plaintiffs have stated an Education Article claim with allegations pleading the State has failed to fulfill that duty. The Appellate Division instead focused on the *NYSER* Complaint's allegations that failure to implement the Foundation Aid Formula has harmed students in districts statewide. The court did correctly conclude that the *NYSER* Complaint "adequately alleged systemic deficiencies in at least one or two districts – New York City and Syracuse." R. 384 (emphasis added).[14]

If given no choice, Plaintiffs would not reject the relatively less irrational approach of assessing deficiencies in one or a small sample of districts to compel the State to fulfill what should be a self-executing duty of constitutional compliance. But proceeding with a trial based on district-centric evidence would be logical only if the State had first ascertained and fully funded its estimate of the needed "actual costs" directed by the Foundation Aid Formula or some other

[14] To the extent this Court or the lower courts need to consider the adequacy of the *NYSER* Complaint's allegations concerning statewide educational deficiencies, a fulsome discussion showing why the Complaint's allegations support a district-centric claim is set forth in pages 36–39 of Plaintiffs' brief below.

viable formula-based process. It would be improper to assess whether modifications to any formula are needed before the formula is even given a chance to work without restraint and to fully distribute its ascertained funding.[15]

B. The First Department's Rulings on *NYSER*'s Third Cause of Action and on the *Aristy-Farer* Allegations Should Be Affirmed.

Plaintiffs allege the State's current system of accountability is insufficient, and the lower court correctly sustained those allegations in the third cause of action[16] In a single sentence, Defendants half-heartedly assert that a claim concerning adequacy of the State's current system of accountability is somehow predicated on the success of a "funding claim." R. 287. That is wrong, as *CFE* made clear the accountability and funding process obligations are stand-alone duties. *See CFE II*, 100 N.Y.2d at 930. In any event, even if Defendants were right, Plaintiffs have pled viable claims challenging the State's inadequate funding process.

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[15] For the same reason, Defendants' hypothetical that tailored funding remedies could be targeted to individualized districts is misplaced on the facts of our case. *See* App. Br. at 47. Plaintiffs would not be in a position to allege a need for fine-tuning of a formula, or supplemental aid above and beyond what a formula provides for a particular district, until the State allows a needs-based methodology—the Foundation Aid Formula or otherwise—to freely operate and fully fund all districts.

[16] The Appellate Division did dismiss the "information and guidance" provisions of ¶ 195(c) of the Complaint, R. 193, but Plaintiffs are not appealing that ruling.

The *Aristy-Farer* Complaint alleges essentially the same substantive Education Article violations pled in the *NYSER* Complaint concerning the State's failure to follow a needs-based education funding system. *See NYSER* Compl. ¶¶ 131, 191(g) (R. 174–75, 191). The only material difference is *Aristy-Farer*'s focus on the APPR penalty issues. Accordingly, the lower court correctly upheld the *Aristy-Farer* Complaint on the grounds it represents a subset of the main issues raised by the *NYSER* Complaint, and permitting one to proceed without the other would be inappropriate.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the decision below, modified to confirm that the State has an ongoing, self-executing duty to ascertain the "actual costs" of providing all students in the state with the opportunity to obtain a sound basic education and to fully appropriate State funding needed to meet that actual student need, and that this Court clarify the intent of the Court's *CFE* rulings on the other major constitutional issues raised by this appeal.

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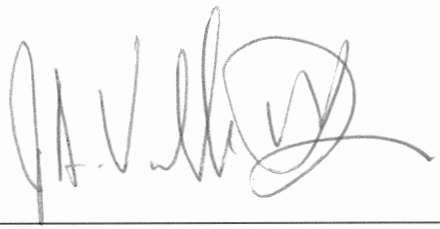
By: Michael A. Rebell

Michael A. Rebell
Attorney at Law
475 Riverside Drive
Suite 1373
New York, NY 10027
Tel: (646) 745-8288
rebellattorney@gmail.com
Attorney for Plaintiffs-Respondents

By: 

Douglas T. Schwarz
John A. Vassallo, III
Peter Shadzik
Michael E. Tracht
Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, NY 10178
Tel.: (212) 309-6000
Fax: (212) 309-6273
douglas.schwarz@morganlewis.com
jvassallo@morganlewis.com
Attorneys for Plaintiff-Respondent NYSER

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 N.Y.C.R.R. Part 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word 2010.

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Morgan, Lewis & Bockius LLP
Attorneys for Plaintiff-Respondent NYSER
101 Park Avenue
New York, NY 10178
Tel.: (212) 309-6000