PRELIMINARY STATEMENT

The State's Brief concedes that the School Funding Reform Act of 2008 ("SFRA") will be substantially underfunded in the 2010-11 school year. In so conceding, the State cannot and does not seriously claim that the dramatic reduction in SFRA formula aid engenders compliance with the express conditions imposed by this Court in upholding the constitutionality of the SFRA in Abbott v. Burke, 199 N.J. 140, 146, 175 (2009) ("Abbott XX"). Rather, the State, in reply, proffers several reasons why this Court should disregard the State's clear non-compliance with the Abbott XX decree. In their essence, those claims represent a bold assault on the Court's constitutional function, ignore the Court's historical role in ensuring adequate education funding, and invite the Court to eschew its responsibility to vindicate the fundamental right to a thorough and efficient education for thousands of at-risk school children across New Jersey.

When confronted in the past with similar excuses for non-compliance with explicit judicial decrees, this Court has never wavered from fulfilling its constitutional obligation to safeguard the rights of these school children, and the Court should not do so now. As Plaintiffs explain in further detail below, the State's claims are unpersuasive. The time has come for the Court to act, and Plaintiffs' motion should accordingly be granted.

ARGUMENT

POINT ONE

THE SUBSTANTIAL UNDERFUNDING OF THE SFRA, CONCEDED BY THE STATE IN ITS BRIEF, CONSTITUTES A GRAVE VIOLATION OF PLAINTIFFS' CONSTITUTIONAL RIGHT TO A THOROUGH AND EFFICIENT EDUCATION AND REQUIRES APPROPRIATE JUDICIAL RELIEF ON THIS MOTION

The State concedes the over $1 billion, or 13.6%, "overall reduction in SFRA formula aid" to school districts across the state for 2010-11, along with the "greater per pupil reduction" in SFRA formula aid to "districts with higher percentages of at-risk students." Brief in Opposition to Motion in Aid of Litigants Rights, at 4-6 ("State's Br."). Further, the State cannot and does not claim that the substantial and educationally devastating aid cuts comply with the express precondition upon which this Court upheld the constitutionality of the SFRA: that the State provide school funding aid in 2010-11 "at the levels required by the SFRA's formula." Abbott v. Burke, 199 N.J. 140, 146, 175 (2009) ("Abbott XX"); State's Br. at 13-14.

The State, instead, relies on several excuses for its non-compliance with Abbott XX and for the resulting patent violation of Plaintiffs' fundamental right to a thorough and efficient education ("T&E") under the Education Clause, N.J. Const. Art. VIII, §4, ¶1. These claims lack merit and must be rejected. More fundamentally, the State's invitation to ignore prior precedent and the Court's historic, institutional role as the

last resort guarantor of Plaintiffs' constitutional rights must, in order to maintain our constitutional system of government, be firmly declined.

A. Allocation of SFRA Formula Aid Reduction

The State asserts that the violation of the Abbott XX mandate for SFRA formula level aid is not of "constitutional dimension" because the State sought to impose the aid cuts "equitably" across the state. State's Br. at 10-11. But this contention seeks to deflect attention from the severity of the State's constitutional violation. Regardless of the means devised to apportion the formula aid cuts among districts, the State cannot mask the stark and uncontested reality that the over $1 billion reduction in such aid below the levels provided under the SFRA in 2009-10 "departs significantly" from the SFRA formula. See Plaintiffs' Brief in Support of Motion in Aid of Litigants' Rights, at 6 ("Pl. Br.")(citing analysis and conclusion of non-partisan Office of Legislative Services). The State also does not dispute, nor can it, Plaintiffs' detailed evidence on this motion of the widespread and devastating effect of these cuts in formula aid on essential educational programs, services and staff in high need districts, including but not limited to the former Abbott districts. Pl. Br. at 7-10.

Most importantly, the assertion that the method of allocating State aid shields these substantial aid reductions

from reaching “constitutional dimension” is fundamentally at odds with the holding in Abbott XX that, if fully funded, the SFRA is a constitutional response to the requirements of the T&E Clause. At its core, Abbott XX stands squarely for the principle that the SFRA formula -- and the requisite state aid amounts -- are concretely linked to, and therefore represent, the "constitutionally adequate" level of resources necessary to "achieve a thorough and efficient education for every child, regardless of where he or she lives." Abbott XX, 199 N.J. at 175; Pl. Br. at 12-14. As Abbott XX makes abundantly clear, the "SFRA will remain constitutional only if the State is firmly committed to ensuring that the formula provides those resources necessary for the delivery of State education standards across the State." Id. at 170(emphasis added).

Indeed, the State now ignores its own claim -- made to this Court a year ago in Abbott XX -- that SFRA passed constitutional muster because the statute “was developed through a commendable process that ensures a thorough and efficient education for all students in New Jersey" and that "the funding under the SFRA was linked specifically to the costs of those resources necessary for at-risk and [limited English proficient] students to achieve the [State's academic standards]." State's Reply to Plaintiffs’ Exceptions, at 7 and 22-3(April 13, 2009). In short, the State supported the constitutionality of the SFRA in this Court, and

the Court upheld the SFRA in Abbott XX, only because the aid generated by the funding formula was determined to be constitutionally adequate to fulfill the requirements of the Thorough and Efficient Education Clause of the Constitution. The Court should therefore reject the State's present, incongruous argument that the failure to provide the "constitutionally adequate" level of resources required by the SFRA is not of "constitutional dimension."

B. Fiscal Conditions

The State also relies upon fiscal difficulties to justify disregarding both the SFRA formula and the Abbott XX mandates, claiming it had "few options" other than adopting "an extremely austere budget." State's Br. at 11. When the State presented the SFRA for constitutional review just over a year ago, it did so, as this Court acknowledged, in "difficult economic times," including the "extreme pressure on scarce State resources." Abbott XX, 199 N.J. at 172(emphasis added). In so doing, the State never suggested to this Court that the promised funding of the SFRA could or would be dependent, let alone that it would likely be compromised, based upon on the State's fiscal condition over the coming months. Id. Such arguments should be taken for what they are: an unconstitutional change in policy.

Nor, in any event, is there anything in the history of this litigation or elsewhere to suggest that the Plaintiffs' constitutional right to T&E might rise or fall, as the State now argues, depending upon constantly changing and recurring State fiscal conditions, or with varying plans, proposals or priorities of different administrations. See, e.g., Abbott v. Burke, 149 N.J. 145, 198(1997)("Abbott IV")(ordering immediate increase in state aid to ensure constitutionally adequate funding, given Legislature's knowledge of Court's prior-imposed deadline for such funding); Abbott v. Burke, 163 N.J. 95, 102 (2000) ("Abbott VI")(directing State to determine and secure preschool funding, reaffirming holding in Abbott v. Burke, 153 N.J. 480, 517-18(1998)("Abbott V") that "adequate funding remains critical to the achievement of a thorough and efficient education"); see also Abbott v. Burke, 172 N.J. 294(2002)("Abbott IX"); Abbott v. Burke, 177 N.J. 596 (2003); Abbott v. Burke, 187 N.J. 191 (2006)("Abbott XV")(limiting Abbott districts' budgets in response to, inter alia, the State's ongoing fiscal condition, but establishing procedures to ensure constitutionally adequate funding for necessary staff, programs and services).

Indeed, this Court has never suggested that claims of fiscal difficulties could absolve the State from failing to provide constitutionally adequate funding, as required by the

T&E Clause. To the contrary, the Court has consistently held that the provision of adequate funding "will be the measure of the State's constitutional obligation to provide a thorough and efficient education" to New Jersey's public school children. Abbott V, 153 N.J. at 519; Robinson v. Cahill, 69 N.J. 449, 467-60(upholding the facial constitutionality of the Public School Education Act of 1975, "assuming it is fully funded"); see also Campbell County Sch. Dist. v. State, 907 P. 2d 1238, 1279 (Wyo. 1995)(declaring a "lack of financial resources will not be an acceptable reason" for the State's failure to provide constitutionally adequate funding, and that "[a]ll other financial considerations must yield until education is funded"). Because such funding is, on this record, not being provided, Plaintiffs' motion should be granted.

C. Spending Levels and Federal Aid

The State contends that the substantial underfunding of the SFRA formula aid should be excused because the Abbott districts "spend more" per pupil than wealthy (I&J) districts, State's Br. at 12, and "have access to substantial amounts of federal aid." State's Br. at 13. But, ironically, the un-weighted per pupil spending comparison presented on this motion is the same data proffered by the State in support of the SFRA formula in Abbott XX. There, the Court, which was fully apprised of the State's spending data, upheld the constitutionality of the SFRA based

upon the State's commitment to provide aid at SFRA's formula levels. Id., 199 N.J. at 172, n.14.

Moreover, the State's un-weighted per pupil spending comparison ignores the wide differences in revenues and expenditures generated by the stark variations in concentrations of student poverty and other student needs, which the SFRA takes into account through student "weights." Using the weighted student enrollment data, in fact, under the SFRA, I&J districts spend $11,643 per pupil, while Abbott districts spend $10,539 per pupil. See Supplemental Certification of Melvin Wyns, at ¶¶ 4-5 (calculating per pupil spending using the weighted student enrollment contained in the SFRA formula).

The State also proffered data on likely federal aid levels in Abbott districts in Abbott XX, which factored into the Court's decision to reject the Special Master's recommendation that the Abbott supplemental funding remedy remain available during the initial implementation phase of the SFRA. Abbott XX, 199 N.J. at 174. Further, the Court acknowledged the State's representation – now abandoned in its Brief -- that federal funds would not be used "as a crutch against some structural failing in the funding scheme itself." Id. And the Court, in response, reaffirmed its prior ruling that the State cannot rely on such funds, as the State seeks to do now, to provide constitutionally adequate funding for New Jersey's public school

children. Id.; Abbott v. Burke, 119 N.J. 287, 331 (1990)("Abbott II"). Thus, districts' overall spending levels and the availability of federal funds, whatever they might be in 2010-11, should have absolutely no bearing on, and are wholly irrelevant to, the State's continuing obligation under Abbott XX to provide state aid at the requisite SFRA formula amount.[1]

D. Separation of Powers

Finally, the State argues that principles of separation of powers prevent the Court from fashioning appropriate relief to remedy the clear violation of Plaintiffs' constitutional right to a thorough and efficient education on this motion. State's Br. at 15-20. This argument has been repeatedly rejected by the Court in the past and is equally troubling now.

First, the State relies upon irrelevant case-law -- in particular, Karcher v. Kean, 97 N.J. 483 (1984) and City of Camden v. Byrne, 82 N.J. 133 (1980) -- to support its separation

[1] The State tries to equate the "save-harmless aid" at issue in Robinson v. Cahill, 69 N.J. 133(1975)("Robinson IV") with adjustment aid in the SFRA formula. State's Br. at 13. As the State admits elsewhere in its Brief, however, the Court in Robinson reallocated save-harmless aid "to less wealthy" districts as an interim measure to advance T&E pending legislative action on a permanent formula. State's Br. at 12; Robinson IV, 69 N.J. at 149-50. In sharp contrast, adjustment aid is designed as an integral component of the SFRA formula to address municipal overburden, an issue that the State itself has recognized "is a problem" under the SFRA for many districts. Abbott XX, 199 N.J. at 157, 164-66. Thus, the State's suggestion that adjustment aid does not "serve the goal of equal educational opportunity," State's Br. at 13, is belied by the SFRA formula's design, as upheld in Abbott XX.

of powers arguments. State's Br. at 15-17. The sole question in Karcher was the Governor's use of the line item veto in the Legislature's annual appropriations act; the role of the judiciary vis-à-vis the other branches was not before the Court. And, while City of Camden addresses issues of judicial power, it does so exclusively in the context of unmet statutory obligations. Unlike the present motion, and the Robinson decisions, the Court in City of Camden did not confront the failure of the other branches to comply with their obligations with regard to fundamental constitutional rights, like those at issue here.

The State next attempts to recast the Court's decision in Robinson IV as restricting, or even prohibiting, judicial authority to remediate a violation of fundamental rights under the Education Clause whenever the Appropriations Clause, N.J. Const. Art. VIII, §II, ¶2, might be implicated. State's Br. at 17-18. To the contrary, Robinson IV vindicates the bedrock principles which are at the heart of the separation of powers among the respective branches of government. As the Court made clear, the judicial branch is entrusted with the authority to not only make final determinations involving a "transgression" of fundamental constitutional guarantees, but also to "'afford an appropriate remedy to redress a violation of those rights.'" Robinson IV, 69 N.J. at 147, citing Asbury Park Press v. Wooley,

33 N.J. 1, 12 (1960) and Cooper v. Nutley Sun Printing Co., Inc., 36 N.J. 189, 196 (1961). While ordering the redistribution of education funds as a "provisional" measure to give the Executive and Legislature time to enact a permanent, constitutionally compliant funding formula, the Court left no doubt as to its authority to remediate a violation of the Education Clause, even where it may directly or indirectly effect appropriations, "when no alternative remains:"

> This Court, as the designated last-resort guarantor of the Constitution's command, possesses and must use power equal to its responsibility. Sometimes, unavoidably incident thereto and in response to a constitutional mandate, the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government. And while the court does so, when it must, with restraint and even reluctance, there comes a time when no alternative remains. That time has now arrived.
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> [Robinson IV, 69 N.J. at 154-55 (internal citation omitted).]

The State further ignores the rulings just one year later in the Robinson litigation, when the Court faced a situation remarkably similar to the present circumstances. In Robinson V, the Court upheld the constitutionality of a new funding formula -- the Public School Education Act of 1975 -- but retained jurisdiction to ensure that the Legislature and Executive "enact[ed] a provision for the funding in full of the State aid provisions of the 1975 act for the school year 1976-1977." Robinson V, 69 N.J. at 468(emphasis added). To ensure such full

implementation of the new, constitutionally adequate formula, the Court, by order to show cause, placed the State on notice of the affirmative and injunctive relief it would enter in the event the required state formula aid was not forthcoming by June 30, 1976. Id. Moreover, when the State failed to comply with the Robinson V mandate for formula funding, the Court entered injunctive relief necessary to address the State's clear constitutional violation:

> Our determination in Robinson V was reached on the assumption that 'complete funding (would) be forthcoming to furnish the necessary means to put (the 1975 Act) into full operation.' Robinson V, 69 N.J. at 454, n.2, absent which funding that statute 'could never be considered a constitutional compliance with the[Education Clause]....
>
> We retained jurisdiction and stated that if the Legislature did not provide for such funding by April 6, 1976, we would issue an order to show cause why certain specific or other relief, including injunctive relief, should not be mandated...To date there has been no final legislative action funding the financial aid provisions of the 1975 Act.
>
> The continuation of the existing unconstitutional system of financing the schools into yet another school year cannot be tolerated. It is the Legislature's responsibility to create a constitutional system. As we stated in [Robinson v. Cahill, 62 N.J. 473, 520 (1973)("Robinson I")], 'The judiciary cannot unravel the fiscal skein.' The Legislature has not yet met this constitutional obligation. Accordingly, we shall enjoin the existing unconstitutional method of public school financing.
>
> [Robinson v. Cahill, 70 N.J. 155, 159-60 (1976)("Robinson VI")(emphasis added)

Contrary to the State's assertion, the posture of Plaintiffs' present motion is not "inapposite with that which confronted the Court in Robinson IV" or, more properly, the entire course of the Robinson litigation. State's Br. at 19. Rather, the Court in Robinson V and Robinson VI faced the precise circumstance now before this Court: a determination of the constitutionality of a new statewide formula, expressly conditioned on the requirement that "complete funding (would) be forthcoming" to put the formula "into full operation;" the State's failure to provide the requisite funding, in direct contravention of the Court mandate; and the Plaintiffs' request for an order enjoining the State's "existing unconstitutional method of public school financing." Robinson VI, 70 N.J. at 159-60.

In upholding the constitutionality of the SFRA formula, and directing formula level funding so that its "full implementation" can "proceed," the Court -- as it did in Robinson -- reaffirmed its "role in enforcing the constitutional rights of the children of this State should the formula prove ineffective or the required funding not be forthcoming." Abbott XX, 199 N.J. at 169, 174(emphasis added).[2]

[2] The State also contends there is "[n]o legal basis" for enjoining the three-year statutory review of the SFRA formula because Plaintiffs can raise concerns about the review -- including whether it is "compromised by the level of funding in

Thus, there is no "principle" of separation of powers, as the State asserts, that prevents this Court from "require[ing] remediation" of the "problems" and "deficiencies of a constitutional dimension" that have now clearly "emerge[d]." Abbott XX, 199 N.J. at 146. There is no question but that the present constitutional deficiencies result from the State's massive underfunding of the SFRA, an action taken in direct conflict with the Abbott XX mandate for formula level funding. As in Robinson, the "time has now arrived" when, it being clear that the State has failed to fulfill its commitment -- and meet its constitutional obligation -- to fund the SFRA, the Court has no alternative but to "enjoin the existing unconstitutional method of public school financing." Robinson IV, 69 N.J. at 154-55; Robinson VI, 70 N.J. at 160.

In sum, this Court must confront the same "constitutional exigency" as it did in the Robinson litigation, and "must now proceed" to enforce Plaintiffs' fundamental right to T&E:

> The Court has now come face to face with a constitutional exigency involving, on a level of plain, stark and unmistakable reality, the constitutional obligation of the Court to act. Having

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FY2011" -- to the Legislature. State's Br. at 14, n.9. The issue before the Court has nothing to do with the legislative process after the review is released, but rather with the integrity of the review itself. Without providing full funding, the State has rendered meaningless this Court's companion directive that the formula be "diligently" reviewed "after its initial years of implementation and to adjust the formula as necessary based on the results of that review." Abbott XX, 199 N.J. at 169.

previously identified a profound violation of constitutional right, based upon default in a legislative obligation imposed by the organic law in the plainest of terms, we have more than once stayed our hand, with appropriate respect for the province of other Branches of government. In [the] final alternative, we must now proceed to enforce the constitutional right involved.

[Robinson V, 69 N.J. at 139-40(emphasis added)].[3]

[3] The State describes as "questionable" the Court's jurisdiction to enter relief addressing SFRA funding on a statewide basis. State's Br. at 21, n.12. Here again, the State ignores Abbott XX, and specifically the Court's determination to uphold the SFRA as "as a state-wide unitary system of education funding," coupled with the mandate for formula level aid. Abbott XX, 199 N.J. at 146-47 (emphasis added). As a party to Abbott XX, Plaintiffs have the right to seek enforcement of the express terms of this Court's mandate, even if their fellow students, particularly at-risk students in high need districts, benefit from Plaintiffs' motion.

CONCLUSION

For the reasons stated above, and in Plaintiffs' Brief in Support of Motion in Aid of Litigants' Rights, Plaintiffs respectfully request that this Court enter an order enjoining the State from (1) providing school funding aid below the levels required by the SFRA formula for 2010-11; and (2) conducting the required three-year review of the formula, and making recommendations to the Legislature, until such time as the State can demonstrate that the formula has been fully implemented as intended, designed and enacted.

Respectfully submitted,

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