To be Argued by:
MICHAEL A. REBELL
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

LARRY J. MAISTO and MARY FRANCES MAISTO, *et al.*,

Plaintiffs-Appellants,

– against –

THE STATE OF NEW YORK,

Defendant-Respondent.

BRIEF FOR *AMICUS CURIAE*
THE CAMPAIGN FOR EDUCATIONAL EQUITY,
TEACHERS COLLEGE, COLUMBIA UNIVERSITY

MICHAEL A. REBELL, ESQ.
Attorney for Amicus Curiae
525 West 120th Street, Box 219
New York, New York 10027
(646) 745-8288

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AMICUS CURIAE BRIEF OF THE CAMPAIGN FOR EDUCATIONAL EQUITY, TEACHERS COLLEGE, COLUMBIA UNIVERSITY

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INTEREST OF AMICI CURIAE

The Campaign for Educational Equity ("the Equity Campaign") is a nonprofit research and policy center at Teachers College, Columbia University that supports the right of all children to meaningful educational opportunities.[1] The Equity Campaign promotes research by scholars at Columbia University and elsewhere that examines the relationship between specific educational resources and educational opportunities and student success, particularly for students from disadvantaged backgrounds. The Equity Campaign publishes research papers and books and sponsors symposia, workshops and conferences on issues related to educational equity. Its research and publications focus on educational equity issues at the state, national and international levels.

The Equity Campaign also maintains an active website that provides current information on the status of education finance and education adequacy litigations and policy developments in all 50 states. This website, www.schoolfunding.info, is considered the leading national source of accurate, current information on these litigations by scholars, policy makers, litigators and the media. Michael A. Rebell, the Executive Director of the Equity Campaign, was co-counsel for the plaintiffs in the Campaign for Fiscal Equity litigation, before assuming his present positions at the Campaign and as Professor of Practice in Educational Law and Policy at Teachers College and as Adjunct Professor of Law at Columbia Law School.

[1] The positions set forth in this brief represent the views of the Campaign for Educational Equity, but they do not necessarily represent the views of the Trustees, Officers and other members of the faculty at Teachers College, Columbia University.

PRELIMINARY STATEMENT

In its decision in *CFE v. State of New York*, 86 N.Y. 2d 307, 315(1995), ("*CFE* I"), the Court of Appeals held that Article XI, §1 of the state constitution entitles students to the "opportunity for a sound basic education." The Court further specified that this right means "the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants." *CFE v. State of New York*, 100 N.Y. 2d 893, 908 (2003), ("*CFE II*".) Although the *CFE* litigation focused on issues involving students in the New York City public schools, the Court made clear that the state constitution "impose[] a duty on the Legislature to ensure the availability of a sound basic education to *all* the children of the state." *CFE I*, 86 N.Y. 2d at 307; *see also, CFE II*,100 N.Y. 2d at 902 (emphasis added).

Responding to these rulings, in 2007, the Governor and the Legislature determined that the state education finance system was failing to provide students throughout the state, and not just those in New York City who had been the subjects of the *CFE* litigation, the constitutionally-required opportunity for a sound basic education. To rectify these constitutional deficiencies, in 2007 the Legislature adopted a sweeping set of reforms, including a new Foundation Aid Formula that committed the State to increase basic state operating aid to education statewide, over a four year phase-in period, by $5.5 billion.

Although the State largely proceeded to implement on schedule the funding increases called for during the first two years, following the 2008 recession, the State first froze any further increases and then substantially reduced the amount of state aid it distributed to all school districts, including the eight small city school districts in which the plaintiff students in this case attend school. The State's failure from 2009 and continuing to the present time to provide the level of funding that it had itself determined to be necessary to provide students the opportunity

for a sound basic education has had a substantial detrimental impact on the educational opportunities of students throughout the state; the impact of the funding reduction has especially affected the many students from low income backgrounds in high need districts like the plaintiffs' districts in this case.

The Court below essentially decided this case on abstract, and erroneous, legal grounds, ignoring the substantial evidence of detrimental impact related to severe funding shortages that had been presented during an extensive trial. Essentially, the Court held that the Legislature in 2009 was not bound by the constitutional compliance plan that its predecessors had adopted two years earlier. Justice O'Connor ruled that the State could respond to the changed circumstances created by the 2008 recession by drastically cutting state aid to education without taking any steps to ensure that school districts would be able to provide students the opportunity for a sound basic education at these lower funding levels.

This radical ruling substantially undermines students' right to a sound basic education, and it is entirely inconsistent with the Court of Appeals' holdings in the *CFE* litigation. Long-established Court of Appeals precedents also make clear that the state's obligation to respect constitutional rights cannot be abandoned or put on hold because of a recession or state fiscal constraints.

Undoubtedly, economic circumstances in the state and throughout the nation have changed since the recession of 2008. *Amicus curiae* does not take the position that the decisions the state made in 2007 to achieve constitutional compliance were written in stone or that a new plan for constitutional compliance could not have been adopted since that time to respond to changed circumstances. Certainly, the State could have taken steps such as eliminating costly

and unnecessary legal mandates or promoting new, cost-effective educational practices that might have reduced costs without detrimentally affecting educational opportunities. There is, however, no indication and no evidence that the State adopted any such practices.

The Court below spoke of new standards, new teacher evaluation procedures and other "non-fiscal reforms" that the State has adopted in recent years, but Justice O'Connor did not state, let alone issue any findings of fact, that would indicate that the state undertook any cost analyses or monitored the actual impact on students' educational opportunities to determine whether these reforms were intended to reduce costs or had the effect of actually doing so. Nor did the Court below state or issue any factual findings that would indicate that school districts were able to provide students the opportunity for a sound basic education at funding levels substantially below the amounts set forth in Foundation Aid Formula that remains on the statute books, but whose full phase-in has been interminably delayed since 2009.

In the absence of any deliberate action by the State to adopt a new, constitutionally-valid state aid system that can ensure students the opportunity for a sound basic education under current economic and educational conditions, the State should at minimum be required to adhere to the funding levels in the Foundation Aid Formula that it had itself determined to be necessary to meet constitutional requirements.

LEGAL AND FACTUAL BACKGROUND

A. The New York Court of Appeals' Decisions in *CFE v. State of New York*

In *CFE II*, the Court of Appeals held that the state had failed to provide students in the New York City public schools sufficient funding to ensure them their constitutional right to the opportunity for a sound basic education, and it specified the basic steps that the State must take to ensure that students are, in fact, receiving meaningful educational opportunities. Specifically, the Court held that the State must (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." *CFE II*, 100 N.Y. 2d at 930.

The Court afforded the State a thirteen-month timeline for taking the necessary remedial actions. *Id.* The State, however, failed to do so because of an impasse between the executive and legislative branches, leading to a further round of compliance litigation. In *Campaign for Fiscal Equity v. State of New York*, 8 N.Y. 3d 14 (2006) ("*CFE III*"), the Court sought to provide a pathway for resolving this impasse. The Court upheld as not being "irrational," Governor George Pataki's position that a $1.93 billion increase for New York City would meet minimal constitutional requirements. *Id* at 30. These amounts were the lowest of a range of possible increases that Standard and Poor's had listed in a cost analysis they had undertaken for a gubernatorial commission. *Id* at 23-24; 36-36 (Kaye, C.J. dissenting.)

The Court of Appeals' *CFE III* holding was a narrow one. The Court did not establish the $1.93 billion for New York City as a definitive constitutional compliance standard.[2] Rather, it held that the range of figures that the Appellate Division had directed the Legislature in its next session to consider to resolve its impasse with the Governor should be expanded to include the lower figure advocated by the Governor, thus creating a range of constitutionally acceptable figures between $1.93 billion and $5.63 billion for New York City, rather than the range of $4.7 to $5.63 billion that the Appellate Division had ordered. *See id.* at 27 ("[w]e declare that the constitutionally required funding for the New York City School District *includes* . . . additional operating funds in the amount of $1.93 billion") (emphasis added).

B. The State's Initial Response: The Budget and Reform Act of 2007.

The Governor and the Legislature complied with the Court's directive to resolve the executive-legislative impasse and to enact a *CFE* compliance plan during the 2007 legislative session. In doing so, however, they did not accept the low end figures that Governor Pataki's had proposed. Instead, based on an updated cost study from the state education department, New York State Board of Regents Proposal on State Aid, 2007-2008, pp. 44-60, available at http://www.p12.nysed.gov/stateaidworkgroup/2007-08RSAP/rsap0708.pdf., the newly-elected Governor, Eliot Spitzer, recommended a new education finance system to remedy the constitutional violations identified in the *CFE* case; although the Court's specific order had applied only to New York City, the Governor proposed an extensive statewide series of reforms that would ensure that the entire statewide education finance system met the constitutional

[2] Governor Pataki's plan had also called for a minimal $2.45 billion increase for the state as a whole. The Court of Appeals certainly did not endorse this statewide figure, since its remedial directives clearly applied only to New York City. *CFE* II, 100 N.Y. 2d at 928.

requirements spelled out the in the CFE decisions. Executive Budget, Investing in Education, available at http://www.budget.ny.gov/pubs/archive/fy0708archive/fy0708littlebook/BriefingBook.pdf.

The core of the Governor's plan was the creation of a new Foundation Aid Formula that combined approximately thirty previously separate funding streams, "to ensure that each district receives sufficient State and local resources to meet State learning standards." *Id.* Over-all, the foundation formula called for an increase in operating aid to school districts of approximately $5.5 billion. These increases were to be fully phased-in over a four year period. The actual amount of foundation aid to be allocated to particular school districts would be calculated "based on actual costs in successful schools" and in accordance with a formula which adjusted for district enrollment, poverty rates, and cost of living factors. *Id.*

The Legislature responded to the governor's proposal by overwhelmingly adopting the plan, with 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." 2007 Legislative Bill Jacket, N.Y.S. Legislative Archives, L. 2007, ch. 57. The plan was codified in N.Y. Educ. Law § 3602. The foundation formula adopted in 2007 is still the main component of the state's system of general support for public schools, and the funding amounts that the legislature had determined in 2007 to be necessary to provide all students the opportunity for a sound basic education, updated for inflation, remain the amounts for which the statutory foundation formula calls. Of critical relevance to this case, however, the original four–year phase-in period has been delayed continually since 2009. Educ. Law §3602.4.

C. The State's Failure to Implement the Budget and Reform Act of 2007

The State largely adhered to its commitment to phase-in the increases called for by the foundation formula for the first two years. Following the recession of 2008, however, the state

defaulted on its commitments under the Budget and Reform Act of 2007, and from school year 2009-2010 to date, the state has failed to provide school districts throughout the state, including the school districts involved in this case, the amount of state aid it had itself determined to be necessary to provide all students the opportunity for a sound basic education. The trial court summarized this history as follows:

> ...[T]he enacted State budget in 2009-2010 included a freeze in the amount of Foundation Aid at the 2008-2009 level. The 2008-09 budget also reduced the amount of school aid through a mechanism called a "Deficit Reduction Assessment." Beginning in 2010-2011, the enacted State budget again included the Foundation Aid freeze, as well as a Gap Elimination Adjustment ("GEA"), which reduced the school aid amount for each district. Foundation Aid began to be phased in again in the 2012-2013 State budget, and the GEA has been reduced or rolled back piecemeal over several recent budget years.

Trial Court. Dec at 14.

Thus, although the Foundation Aid Formula is still at the core of the state's funding system and the state remains obligated under Edu. Law§ 3602.4 to fully phase in the amounts called for in this formula, for the past seven years the State has continuously failed to allow its formula to freely operate and thus provide the level of funding called for by the system that the State itself developed to meet its constitutional mandate to provide all students the opportunity for a sound basic education. The record in this case indicates that as of the 2014-2015 school year, the eight districts in which the plaintiff students attended schools were denied almost $1.2 billion in state aid which, according to the foundation formula, was required to provide their students the opportunity for a sound basic education. Pl Exs 113-120, entered by stipulation.

ARGUMENT

I. The 2007 Budget and Reform Act Constituted A Valid State-wide System for Complying with Students' Constitutional Right to the Opportunity for a Sound Basic Education

A. In Response to the Court of Appeals' CFE Rulings, the Legislature Adopted a Compliance Plan to Ensure the Opportunity for A Sound Basic Education to All Students in the State, and Not Just to Those in New York City

Based on the constitutional principles the Court of Appeals articulated in the *CFE* litigation and the findings the Court made concerning the structural defects in the then operative state education finance system, in 2007 the State recognized that it needed to substantially revise the entire statewide education funding system in order to provide all students throughout the state the opportunity to obtain a sound basic education. To be sure, *CFE II* did not expressly order the State to undertake a comprehensive statewide funding reform process; the actual case and controversy the *CFE* plaintiffs presented to the courts in *CFE* focused on funding deficiencies for New York City. *CFE II*, 100 N.Y.2d at 928. But *CFE II* did not hold that in remedying the state aid system as it affected the 37% of the state's students who attended school in New York City, the State should ignore the needs of students in the rest of the state. On the contrary, the Court specifically stated that "the State may of course address statewide issues if it chooses." *Id.*

The State choose to remedy the entire statewide funding system in response to the *CFE* rulings because it was clear that the existing system failed to "align funding with need" *Id* at 929, and in order to ensure that "every school....would have the resources necessary for providing the opportunity for a sound basic education." *Id* at 930, not only in New York City but in the state as a whole. State leaders realized and acknowledged that the Court of Appeals' findings of a

misalignment of funding with need applied not only to New York City, but to many school districts throughout the state.

Following the Court of Appeals' *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. First, the state education department undertook a new cost analysis. That 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 figures that Gov. Pataki had recommended, determined that an extra weighting should also be added for students living in sparsely populated rural districts and utilized a new regional cost of living index. New York State Board of Regents Proposal on State Aid, 2007-2008, available at http://www.p12.nysed.gov/stateaidworkgroup/2007-08RSAP/rsap0708.pdf. Based on this analysis, the Regents recommended a new funding allocation methodology—the Foundation Aid Formula—that calibrated funds distribution with need, as the Court of Appeals had mandated, and sought to ensure that sufficient funds to provide the opportunity for a sound basic education would be offered to all students statewide by the end of a four-year phase-in.

Then, in January 2007, in order "to provide a statewide solution to the school funding needs highlighted by the Campaign for Fiscal Equity Law Suit" and based on the recommendations of the Regents and the record and judicial decisions in the *CFE* litigation, Governor Spitzer issued an Executive Budget that proposed a four-year "Educational Investment Plan" that adopted the Foundation Aid Formula and proposed substantial funding increases not only for New York City, but for school districts throughout the state. 2007-2008 Executive Budget, investigating in education, available at http://www.timesunion.com/tuplus-

opinion/article/Fully-fund-Foundation-Aid-for-New-York-s-public-10935315.phphttp://www.budget.ny.gov/pubs/archive/fy0708archive/fy0708littlebook/BriefingBook.pdf.

Gov. Spitzer has specifically stated that: "The 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. The 2007 Annual Report of the Assembly Education Committee stated:

> ***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.*** This funding increase was accompanied by a new Foundation Aid formula which provides a 4-year funding plan and several new accountability initiatives. These actions . . . ***satisfy the requirements of the CFE court decision.***
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> While the 2006 *Campaign for Fiscal Equity* court decision was based only on students attending the New York City School District, the Assembly Majority supported and fought for a statewide solution ***recognizing that many students throughout the State face the same challenges and needs of the students of the New York City School District.***

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 (emphasis added).

The Regents also specifically re-iterated that the primary purpose of the new foundation formula is 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, p.7.

In sum, the 2007 Budget and Reform Act and the Foundation Aid Formula that is at its core, constitute a compliance plan to remedy significant constitutional deficiencies that the State acknowledged existed not only in New York City, but throughout the state. As such, this compliance plan could not legally be thrust aside or neglected because of fiscal constraints resulting from the 2008 recession.

B. The Amounts Called for in the Enacted Foundation Aid Formula, Rather Than Governor Pataki's Proposed Lower Figures, Constitute the Operative "Actual Costs" of Providing Students in New York State the Opportunity for A Sound Basic Education

Justice O'Connor found "compelling" Governor Pataki's proposal for increasing education spending statewide by $2.5 billion ($1.93 billion of which would go to New York City), rather than the $5.5 billion requirement in the Foundation Aid Formula that the legislature actually adopted because "the Court of Appeals in CFE III found ...." the Pataki proposal"... to be reasonable (see 8 N.Y.3d at 30-31.)" Trial Ct. Dec. at 13. This holding, however, ignores the context in which the Court of Appeals issued its ruling and the fact that although the Court of Appeals considered the Pataki Proposal within the range of reasonable cost figures the Legislature should consider, it did not direct the Legislature to adopt that figure.

The issue that the Court of Appeals was confronting in *CFE III* was that at the end of the 13 month compliance period for adopting a compliance plan that the Court of Appeals had ordered in *CFE II*, 100 N.Y. 2d at 930, the executive and legislative branches were at impasse. Although Governor Pataki had proposed a compliance plan to the legislature, the Legislature had refused to adopt it: "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." *CFE III*, 8 N.Y. 3rd at 35 (Kaye, C.J, dissenting.) The State's inability to meet the compliance deadline led the plaintiffs to initiate a new round of litigation to resolve this critical constitutional clash between the executive and legislative branches.

Based on the report of a panel of referees that it had appointed to consider costing out studies that had been submitted by the parties and the state education department, the trial court ordered the State to implement an operational funding plan 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. *CFE v. State of New York*, 2005 WL 5643844 (N.Y.Sup.)(Feb. 14, 2005) The Appellate Division subsequently modified that order by directing the state to consider "as within the range of constitutionally required funding for the New York City School District, amounts between $4.7 billion and $5.63 billion, or an amount in between, phased in over four years." *Campaign for Fiscal Equity v. State*, 29 A.D. 3d 175, 202 (1st Dep't 2006.)

While *CFE III* may have "approved of" (*id.* at 45) $1.93 billion as a "reasonable remedial estimate" (*id.* at 44), the Court understood it should not in the first instance assume responsibility for determining the most appropriate constitutional funding increase. For the Court of Appeals to have identified these figures as being definitive would have been to ignore its own repeated emphasis in *CFE III* on the importance of deference to the Legislature. *See, e.g. id.* at 28 ("The

Judiciary has a duty 'to defer to the Legislature in matters of policymaking, particularly in a matter so vital as education financing.... We have neither the authority, nor the ability, nor the will, to micromanage education financing.").

Accordingly, consistent with its emphasis on deference to the legislature, the Court correctly left the decision on determining the methodology and amount of state aid needed to provide a sound basic education to its coordinate branches of state government, which then chose to adopt the 2007 Reform Act and its Foundation Aid Formula. The Court of Appeals in *CFE III* could not have been clearer: "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." *CFE III*, 8 N.Y.3d at 27.

The trial court's finding that $1.93/2.45 billion figures are "compelling," Trial Ct Dec. at 13, fundamentally misconstrued the context, the intent and import of the *CFE III* decision. If Justice O'Connor were correct, the judiciary, not the Legislature, would be charged in the first instance with ensuring a constitutionally compliant system, and the State could never adapt its system to changed circumstances, without returning for the court's approval every time. The Court of Appeals understood that its role in *CFE III* was only to determine whether the Pataki Proposal was rational and needed to be fairly considered by the Legislature in responding to a firm directive from the Court to resolve this long-simmering impasse during the next legislative session.

The directive that the Court of Appeals actually issued in *CFE III* required the State to make a final decision and resolve its impasse in adopting a budget for the next fiscal year; in doing so, the Court mandated that the legislature consider a range of constitutionally acceptable

figures between $1.93 billion and $5.63 billion for New York City, plus adjustments, rather than the range of $4.7 to $5.63 billion that the Appellate Division had ordered.

As modified, therefore, the final operative order in *CFE III* stated that

> [The State is] directed that, in enacting a budget for the fiscal year commencing April 1, 2007, the Governor and the Legislature consider, as within the range of constitutionally required funding for the New York City School District, as demonstrated by this record, *a funding plan of at least $1.93 billion, adjusted with reference to the latest version of the GCEI and inflation since 2004, and the Referees' recommended annual expenditure of $5.63 billion, adjusted for inflation since 2004, or an amount in between,* phased in over four years, and that they appropriate such amount, in order to remedy the constitutional deprivations found in *CFE II*.

29 A.D. 3d at 191, as modified by 8 N.Y. 3d at 57 (emphasis added).

The 2007 Budget and Reform Act complied with this directive. After giving careful consideration to the Regents' revised cost methodology, the Legislature decided to adopt the Foundation Aid formula the Regents had recommended as well as a number of other reforms the newly-elected governor had proposed, and in doing so, it determined that increases in basic operating aid of $5.5 billion were necessary to provide all students in the state the opportunity for a sound basic education rather than the lower figures the former governor had proposed.

C. Budgeting Constraints Cannot Abridge Constitutional Rights

The Court below held that the State "can alter ... the levels of funding for each school district based upon the fluctuation of the State's fiscal condition, the needs of the school districts, ...and other competing issues that are considered in the development of the New York State budget." Trial Ct. Dec at 12. This stance is fundamentally inconsistent with established New York State law. The State must meet its obligation to provide students "the actual cost" of a

sound basic education based in accordance with student need (*CFE II*, 100 N.Y. 2d at 930), no matter how real or dire state fiscal constraints may be.

In *Sgaglione v. Levitt*, the Court of Appeals invalidated the New York State Financial Emergency Act. 37 N.Y.2d 507, 514 (1975). The case pitted "*the obviously compelling and urgent stringency with which the city and State [we]re faced*" against the state constitution's non-impairment clause. *Id.* at 511 (emphasis added). The Court concluded the statute 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 (emphasis added).

In *Flushing National Bank v. Municipal Assistance Corporation for the City of N.Y.*, the Court again rejected the fiscal hard-times defense where a law delayed entitlement to a constitutional right. 390 N.Y.S.2d 22 (1976). There, the Emergency Moratorium Act was held to be unconstitutional because its three-year freeze on actions to enforce the city's debt obligations abrogated creditors' rights under the "faith and credit" clause of the state constitution. *Id.* at 732-33. As in *Sgaglione*, the Court had no problem rejecting the defense of "insufficient funds," 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. . . ." *Id.* at 736, 739 (emphasis added).[3]

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[3] The doctrine that constitutional rights cannot be compromised because of state fiscal constraints is also the law in virtually all other states. For example, in the specific context of educational funding, the Kentucky Supreme Court held that the general constitutional rule that "the financial burden entailed in meeting [constitutional requirements] in no way lessens the constitutional duty." *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 208 (Ky. 1989.) The Wyoming Supreme Court articulated the applicable constitutional requirement in even stronger language. It held that "all other financial

The Court of Appeals 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) (the need to "reorder[] legislative priorities" in times of fiscal "scarcity" "does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right"); *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537 (1984) (rejecting argument that there "simply [was] not enough money to provide the services that plaintiffs assert[ed] [were] due them" as "particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights").

II. The State Has an Obligation to Maintain at All Times an Education Funding System that Provides All Students in the State the Opportunity for a Sound Basic Education.

A. The Legislature Could Not Legally Abandon the Constitutional Scheme Embodied in the 2007 Budget and Reform Act without Substituting an Alternative Constitutionally-Adequate System

In her decision, Justice O'Connor held that it is "impossible for the actions of a Legislature to bind future Legislatures with regard to its funding decisions." Trial Ct. Dec at 12. Specifically, she then held that "the enacted budget of 2007-2008 did not, and could not, require future Legislatures to fund school aid in the manner enacted that year." *Id.*

The general proposition that a legislature cannot bind future legislatures on funding matters is sound as applied to ordinary legislation and ordinary appropriations. But the general proposition is qualified here because to comply with its constitutional obligations under the

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considerations must yield until education is funded." *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995).

Education Article, the State's education funding system must at all times operate on a methodology that is calibrated to ensure that all students statewide are provided the opportunity to obtain a sound basic education. In 2007, the Legislature not only adopted a two-year budget, but it also adopted such a constitutionally compliant methodology that included a Foundation Aid Formula and other reforms developed specifically to respond to the constitutional deficiencies of the previous state education finance system. In other words, the 2007 Budget and Reform Act was not an ordinary annual appropriation. Rather, contrary to the lower court's conclusions, it provided a constitutional compliance scheme consisting of a formula-based methodology that must be allowed to operate freely if the State's reforms are to be given any credence.

This is not to say, of course, that a future legislature cannot reconsider and revise a constitutional compliance scheme. Certainly, it can do so -- *provided that the modifications result in a system that continues to ensure that all students will receive the opportunity for a sound basic education.* The fundamental flaw in the trial court's position is that it absolves the Legislature of any continuing obligation to ensure constitutional compliance.

Justice O'Connor refers in her decision to a "Post-CFE" state of affairs. Trial Ct Dec. at 10. In essence, she appears to be saying that once the Legislature had adopted the 2007 Budget and Reform Act, it had no further obligation to continue to adhere to the requirements of N.Y. Const. Art. XI §1. It could simply abandon the Foundation Aid Formula two years later, even if it were not fully funded, because of the state's financial constraints, regardless of the impact of this action on students' opportunities to receive a sound basic education.

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Justice O'Connor's ruling, if upheld by this Court, would mean that the three major decisions the Court of Appeals issued in the *CFE* litigation have no continuing force. It would signify that the Legislature in 2007 was obligated only to develop a funding system that complied with the sound basic education requirements of Art. XI § 1 for two years; after that time, a new legislature could abandon the constitutional reforms and revert to its previous practice of making annual appropriations regardless of actual costs and actual needs, in total disregard of the constitutional compliance parameters the Court had laid down in *CFE II.* Surely such an absurd result cannot have been the intent of the Court of Appeals in repeatedly upholding students' rights to an opportunity for a sound basic education in the *CFE* litigation.

State officials certainly have a constitutional obligation to balance the budget each year. At the same time, however, they also have a continuing constitutional obligation to respect and comply with the Education Article -- the only provision in the state constitution that imposes an affirmative obligation on the state to provide specific benefits to citizens. State officials acknowledged that in responding to the impact of the recession in 2009 they imposed the "gap elimination adjustment" solely "[t]o achieve necessary State savings..." Exec Budget, 2010-2011, New York State Division of the Budget, 2010-2011 Archives, Education and the Arts, p.1, without any regard for their continuing constitutional obligation to provide students a sound basic education. The Legislature cannot, however, simply flout one constitutional obligation in complying with another. In setting budget priorities and responding to fiscal constraints, the

legislature must find a way both to ensure students statewide the opportunity for a sound basic education and balance the annual budget.

B. The State Did Not Respond in a Constitutionally- Appropriate Manner to Changed Economic and Educational Circumstances

Instead of simply jettisoning its own constitutional compliance plan because of the changed economic realities that resulted from the 2008 recession, the State could have undertaken a new constitutionally-appropriate process to determine how it could ensure students the opportunity for a sound basic education under these changed circumstances. The constitutional requirement that funding be based on "actual costs" contemplates that the educational funding system can and should evolve over time, since costs will fluctuate over time.

For example, the State could have pursued reforms to the education system by eliminating costly and unnecessary regulations and mandates, or it could have worked to develop more efficient ways to deliver educational services. It could have undertaken a valid new cost study responsive to changed circumstances and changed practices that might have found that due to the changed economic circumstances and new, cost-effective educational practices that had been put into effect, school districts could provide their students the opportunity for a sound basic education at funding levels that differed from those identified by the 2007 Budget and Reform Act. But since 2009, the State has done none of these things. Instead, the State simply adopted funding reduction mechanisms like the "gap elimination adjustment" and delayed interminably providing the amounts called for under the Foundation Aid Formula, without any regard for the impact of these reductions on the schools' ability to continue to provide students a sound basic education.

The Court below held that funding levels must be considered "in conjunction with the other significant reforms to the standards in the State, the teacher performance tools and

measures, and other non-fiscal reforms designed to assist these struggling school districts to achieve improved student performance..." Trial Ct Dec. at 15. Justice O'Connor is correct that in assessing the "actual cost" of providing a sound basic education at any point in time, these types of "non-fiscal" factors should be taken into account. It may be that changes in these and other "non-fiscal reforms" could have allowed school districts to provide their students a sound basic education at a lower cost level ----- ***but the State does not know if that is so because it never undertook any cost analysis to determine whether, in fact, educational policies adopted after 2007 decreased costs --- or possibly increased costs.*** Furthermore, the Court below does not know what, if any, impact these "non-fiscal reforms" may have had because it issued no findings of fact dealing with this issue.

Justice O'Connor acknowledged that the cost impact of these "non-fiscal reforms" "cannot truly be assessed yet." *Id.* Apparently, she was indicating that the court was not yet in a position to analyze and assess the impact on children's opportunity for a sound basic education of the multiple "non-fiscal reforms" she cited. Certainly, undertaking such an analysis, at least in the first instance, is not the courts' responsibility. But it clearly is the state's responsibility.

The Court of Appeals definitively decreed in *CFE II* that the State must "ascertain the actual cost of providing a sound basic education." *Id,* 100 N.Y.2d att 930. In doing so, the Court also held that the State must undertake its cost analysis in light of "the current system of....managing schools....." *Ibid.* In other words if non-fiscal management practices have a bearing on costs, the State clearly can and should take those factors into account in determining "the actual cost" of a sound basic education. But since 2009, the state has not even attempted to re-consider the actual cost amounts set forth in the Foundation Formula in a manner that examines non-fiscal management practices and school-based needs, so it has no idea whether the

educational policies adopted over the past decade have, in fact, increased or decreased actual costs. Unless and until the State undertakes an appropriate, current cost analysis that assesses all of these factors, the foundation formula amounts, which were developed through a constitutionally-compliant process, must stand.

In responding to the changed circumstances brought on by the 2008 recession, the State was also obligated to take additional steps to comply with its obligation to maintain "a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education." *CFE II*, at 930. If it planned to reduce appropriations for education and to adopt new policies that may have had cost implications, the State had an obligation to assess the actual impact of these fiscal and policy changes on the school districts' ability to provide students the opportunity for a sound basic education; it could not merely tell the school districts that somehow they must "do more with less," without fairly determining that it was possible to maintain a constitutionally-compliant level of education with substantially reduced funds.

An example of procedures that other states have adopted to ensure that their students are provided the opportunity for a sound basic education on a continuing basis is "Act 57," enacted by the Arkansas legislature in response to the court's orders in *Lake View School District No. 25 of Phillips County v. Huckabee*, 91 S.W.3d 472 (Ark. 2002). This statute requires the House and Senate education committees on an on-going basis to:

> (1) Assess, evaluate, and monitor the entire spectrum of public education across the State of Arkansas to determine whether equal educational opportunity for an adequate education is being substantially afforded to the school children of the State of Arkansas and recommend any necessary changes;
>
> (2) Review and continue to evaluate what constitutes an adequate education in the State of Arkansas and recommend any necessary changes;

> (3) Review and continue to evaluate the method of providing equality of educational opportunity of the State of Arkansas and recommend any necessary changes;
>
> (4) Evaluate the effectiveness of any program implemented by a school, a school district, an education service cooperative, the Department of Education, or the State Board of Education and recommend necessary changes;....
>
> 7) Review and continue to evaluate the amount of per-student expenditure necessary to provide an equal educational opportunity and the amount of state funds to be provided to school districts, based upon the cost of an adequate education and monitor the expenditures and distribution of state funds and recommend any necessary changes....

Ark. Code Ann. § 10-3-2102(a) (2012).

The Arkansas Supreme Court emphasized the importance of these procedures for meeting that state's constitutional obligations:

> Without a continual assessment of what constitutes an adequate education, without accounting and accountability by the school districts, without an examination of school district expenditures by the House and Senate Interim Committees, and without reports to the Speaker of the House and the President of the Senate by September 1 before each regular session, the General Assembly is 'flying blind' with respect to determining what is an adequate foundation-funding level.

Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 220 S.W.3d 645, 654–55 (Ark. 2005).[4]

The Arkansas procedures constitute a clear, common sense prescription of the steps a state needs to "make an informed [budget] decision" *Id.* at 655, each time budget allocations for public education are substantially reconsidered. Certainly, such procedures are especially vital

4 After finding that the legislature had not appropriately followed these statutory requirements for the previous two years, the court directed the state to follow these procedures in the future and emphasized that "[t]he amount of funding shall be based on need and not funds available." *Id.* at 654–55 n.4.

when the state is considering greatly reducing previously-established funding levels. By failing to undertake any such procedures for the past five years, New York's governors and Legislature certainly have been "flying blind." The cost analysis and assessment of student needs underlying the 2007 Foundation Aid Formula may now be outdated. But the State simply cannot constitutionally jettison or substantially modify that system without first analyzing carefully current economic conditions, current educational conditions, current operational practices and current student needs and then incorporating those findings into the structure of a new, constitutionally-compliant funding system.

C. The State is Ultimately Responsible for Ensuring that Local School Officials Have Sufficient Funding and Are Managing the Schools Competently in Order to Ensure that All Students Are Receiving the Opportunity for a Sound Basic Education

Justice O'Connor also held that "the performance of many of the students is not acceptable" and that "These students certainly deserve the opportunity to succeed." Trial Ct Dec. at 15. She then stated that "the educators, administrators, State actors, and other employees of the school districts have a responsibility to see the reforms through to the end and improve results for their students." *Id.* This stance implies that if students in the plaintiffs' districts are not currently performing well, local school officials and employees, as well as "State actors," need to do more to ensure that they are receiving an opportunity for a sound basic education that will result in improved educational outcomes. The court below did not, however issue any finding of fact that might indicate the extent to which local school officials and employees and/or state actors are failing to take the steps necessary to improve results for their students, or in what ways their actions are deficient.

However, whatever may be the reasons why these students are not currently receiving the educational opportunities that will allow them to perform well, two basic constitutional

principles are clear. First, the students are entitled to receive a constitutionally-compliant educational opportunity *now* and not on some distant, unspecified future date. The Court of Appeals specifically decreed in *CFE III* that constitutional compliance must be achieved by the end of a four-year phase-in period, which period should have ended in 2011. *CFE III*, 8 N.Y.3d at 32, affirming, *inter alia*, the four year phase-in period ordered in 29 A.D. 3d 175, 191 (1st Dep't, 2006.) When the state education department undertook the statewide cost study and recommended the foundation formula that the Legislature adopted in the Budget and Reform Act of 2007, it adhered to the same four year phase-in period. The Legislature did the same in enacting the Budget and Reform Act of 2007.

Since 2009, the State has not made any attempt to explain or to justify why a longer phase-in period for meeting the affirmative requirements of Art XI, §1 that the Court of Appeals mandated in *CFE III* and the State accepted as the constitutionally-appropriate phase-in period in 2007 should be or could be extended. The State has simply assumed that in order to balance the state budget, it can extend indefinitely its obligation to comply with the Education Article. Clearly, there is no constitutional basis for that assumption. As Judge Robert S. Smith stated in his concurring opinion in the Court of Appeal's dismissal of the defendants' motion to dismiss this case, "[I]f plaintiffs, the parents of children in those public schools, are constitutionally entitled to have this money spent on their children's educations, they are entitled to it now." *Hussein v. State*, 19 N.Y.3d 899, 908 (2012) (Smith, J. concurring.)

Second, the Court of Appeals concluded that under N.Y. Const. Art XI §1, it is the responsibility of the State, and of no other entity, to ensure a constitutionally compliant education funding system. "[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). This means that ***"[t]he State must ensure*** that New York's public schools are able to teach '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.'" *CFE III*, 8 N.Y.3d at 20 (emphasis added) (quoting *CFE I*, 86 N.Y.2d at 316).

Thus, it is "***the State*** [that] remains responsible . . . [for] the measures by which it secures for its citizens their constitutionally-mandated rights." *CFE II*, 100 N.Y.2d at 922 (emphasis added); *see also id.* at 924 (confirming "the simple constitutional principle that the State has ultimate responsibility for the schools"); *N.Y. Civil Liberties Union v. State of N.Y.*, 4 N.Y.3d 175, 182 (2005) (confirming "education is ultimately a responsibility of the State" notwithstanding any "sabotage" by local school districts). That is why Education Article claims are brought against the *State*, and focus on "**the *State's*** funding system." *CFE II*, 100 N.Y.2d at 902 (emphasis added); *see id.* at 920 (rejecting the State's "funding scheme" arguments "concern[ing] the apportionment of responsibility among various government actors").

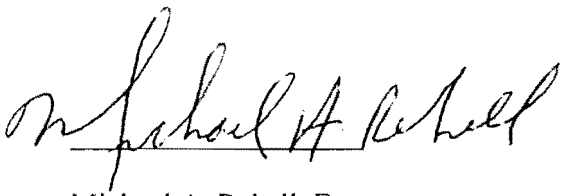
In short, if it is management and operational factors that are denying students in the plaintiffs' districts the opportunity for a sound basic education, it is the State's responsibility to adopt effective accountability and oversight systems that will improve the performance of the local districts. Clearly, no such systems are in place since the state has not even assessed the extent to which the budget cuts of recent years have impacted student performance, let alone determined whether better performance by local or state actors could ameliorate the situation. In the absence of accurate current information about school district performance in relation to available funding and actual student needs, the State must, at the least, provide these districts the

level of funding that its cost studies and accountability reviews in 2007 had determined were constitutionally valid.

CONCLUSION

For all the aforesaid reasons, *amicus curiae* respectfully requests that the Court reverse the decision of the Court below and issue a decision that clarifies the extent of the State's continuing responsibilities under N.Y. Const. Art. XI § 1 and the rulings of the Court of Appeals in the *CFE* litigation to ensure that all students throughout state are provided the opportunity for a sound basic education on a continuing basis.

Respectfully submitted,



Michael A. Rebell, Esq.
Attorney for *Amicus Curiae*
Campaign for Educational Equity

525 W. 120th Street,
Box 219,
New York, NY 10027
646-745-8288
mar224@columbia.edu

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