

EXHIBIT A

STATE OF NEW YORK
APPELLATE DIVISION

THIRD DEPARTMENT

In the Matter of

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

Plaintiffs-Appellants,

BRIEF AMICUS CURIAE
OF THE NATIONAL
EDUCATION ASSOCIATION

-against-

STATE OF NEW YORK,

Defendant-Respondent.

Albany County
Index No. 8997-08

The New York Court of Appeals' trio of decisions in the *Campaign for Fiscal Equity* ("CFE") cases established that the Education Article, N.Y. Const. art. XI, § 1, requires the State to provide all New York public school students with the opportunity for a sound basic education. At the conclusion of the CFE cases, the State came up with the Foundation Aid Formula, a statewide plan designed to bring the funding scheme for public schools into compliance with the Education Article over a period of four years. Yet two years into that process, the Foundation Aid increases were halted, and funding cutbacks were instituted instead. The plaintiffs here challenged—among other things—those cuts, providing detailed

evidence that the funding shortfalls have caused poor student outcomes in their school districts.

Rather than engage in the analysis required by the *CFE* cases as to whether that evidence showed a constitutional violation, the court below simply held that the *CFE* cases did not set any numerical floor below which school funding may be considered *per se* unconstitutional. That conclusion is indefensible for three separate reasons. First, while the *CFE* cases concerned funding in New York City, the Court of Appeals' decisions established that the Education Article requires the State to fund education based on a reasoned determination of what is needed to provide all New York schoolchildren with the opportunity to attain a sound basic education. The Legislature made the required determination when it enacted the Foundation Aid Program, and the subsequent cuts to the Program were unconstitutional as to the Maisto districts because they provided funding in a way that was unrelated to student needs and fell short of the *CFE* standard.

Second, by failing to apply the "inputs-outputs-causation" test established in the *CFE* decisions, the lower court discounted compelling evidence showing a strong causal link between funding and educational outcomes in the Maisto districts. That evidence is further supported by empirical studies that have been released in recent years.

Finally, the lower court's finding that the State's shifting fiscal priorities and the Legislature's appropriations power can override the State's constitutional duty under the Education Article to resource a sound basic education for all New York public school students is inconsistent with basic constitutional principles, established New York precedent, and well-reasoned school finance decisions in other states.

These errors amount to an unapologetic refusal on the part of the Supreme Court to follow the *CFE* precedents established by the New York Court of Appeals. They are incompatible with the goal of providing New York public schoolchildren with a sound basic education, and would render their rights under Education Article "in effect, hortatory." *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 315 (1995). The decision below should be reversed.

I. By Enacting the Foundation Aid Formula in Response to the *CFE* Decisions, the Legislature Established a "Floor" for Adequate School Funding in the Maisto Districts.

In ruling against the Maisto plaintiffs, the Supreme Court rejected the notion that "the enactment of Foundation Aid established a minimum amount [of State funding] that could not be reduced." (Supreme Court Decision and Order ("Order") at 12-13.) This finding misapprehends how the claims in this case relate to the applicable test for determining whether school funding levels comply with the Education Article. As the *CFE* decisions make clear, far from establishing a static

number, the Education Article requires that any education funding formula established by the State reflect a reasonable estimate of the cost of providing a sound basic education. The Foundation Aid Formula represented the State's effort to bring the statewide funding scheme into compliance with that constitutional mandate. Subsequent adjustments to Foundation Aid fail the *CFE* test not because they fall below a set dollar amount—but because they were not calculated to meet student needs in the Maisto districts.

The Court of Appeals has found that the term “education” in the Education Article gives every New York public school student the right to a “sound basic education.” *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 47-48 (1982). In *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307 (1995) (“*CFE I*”), in the context of a challenge to funding levels in New York City, the Court found that *Levittown* represented an “unambiguous acknowledgment of a *constitutional floor* with respect to educational adequacy” set by the Education article. *CFE I*, 86 N.Y.2d at 315 (emphasis added). This “constitutional floor” requires the State to provide “physical facilities and pedagogical services and resources” through the education system that are sufficient to allow students to attain the skills they needed to function as civic participants. *CFE I*, 86 N.Y.2d at 316-18.

At bottom, the *CFE* cases established that the State must fund the public schools based on a reasoned estimate of the cost of a sound basic education for all New York schoolchildren, and fund the public schools accordingly. *CFE III* 8 N.Y.3d at 27 (noting that the State’s calculation of the funds needed to afford students a sound basic education must be rational). By contrast, funding levels that do not “bear a perceptible relation to the needs” of students are constitutionally suspect. *CFE II*, 100 N.Y.2d at 930.

In accordance with these mandates, in 2007 the State undertook another carefully-calibrated study, using the same basic formula approved in *CFE III*, to calculate the cost of a sound basic education statewide. The result was the Foundation Aid Formula, which determined that \$5.5 billion in additional annual operating funds would need to be phased in between 2007 and 2011 in order to provide a sound basic education, or meet “SBE spending targets,” for each district. Plaintiffs’ Proposed Findings of Fact at 63 ¶ 270-73; Dr. Bruce Baker, *Analysis of Spending and Funding for a Sound Basic Education in the Maisto Districts* at 4 ¶ 9 (Nov. 19, 2014).

The outcome urged by the State—and accepted by the Supreme Court below—equates to a finding that the Foundation Aid *proposal* was all that was required to satisfy the Education Article, and a constitutionally-compliant system based on student needs was to be implemented, or not, at the Legislature’s discretion. This is

merely another attempt to revisit an idea the Court of Appeals rejected in the *CFE* cases—that students’ rights under the Education Article are merely “hortatory,” and that the courts have no business wading into matters of educational adequacy. *CFE I*, 86 N.Y.2d at 315. But as the Court maintained throughout the *CFE* cases, “it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them,” and this principle extends to the Education Article. *CFE II*, 100 N.Y.2d at 925.

As these decisions make clear, the Legislature is entitled to heed changed circumstances and revisit whether the Foundation Aid formula continues to serve as a reasonable estimate of the cost of providing a sound basic education, but it is not free to reduce aid purely based on competing budget priorities or temporary fiscal challenges, unmoored from any analysis of student need. Yet that is precisely what the State did when it decided to reduce Foundation Aid for reasons unconnected to student need—it has not even attempted to argue otherwise, opting instead to argue that Foundation Aid was essentially meaningless. *See, e.g.*, Defendant’s Post-Trial Memorandum at 7-27 (Jan. 25, 2016).

In an attempt to evade the *CFE* cases’ clear funding mandate, the Supreme Court below suggested that cuts in Foundation Aid may be ameliorated, in part, by “substantive reforms designed to assist school districts in improving student performance” that the State has enacted in recent years. But in *CFE II* the Court of

Appeals explicitly rejected identical arguments regarding “existing reforms” such as the federal No Child Left Behind Act of 2001 and new state and local accountability measures. *Id.* at 926-27. This outcome was the only sensible one: given that public education is invariably under “reform,” the State could use this argument indefinitely as a means to skirt its responsibility to fund education—depriving students of any meaningful remedy for violations of the Education Article.

Furthermore, even if this rationale were not at odds with the *CFE* decisions, there is no evidence that additional state mandates—however necessarily or well-intentioned—can replace adequate funding as a general matter. At best, the reforms cited by the Supreme Court would increase accountability, which was but one necessary element of the remedy ordered in *CFE II*. 100 N.Y.2d at 930 (finding that in addition to ascertaining and funding the cost of a sound basic education, the State should “ensure a system of accountability” to determine whether the funds accomplished the intended result). And, as is the case with even the most necessary accountability measures, such reforms often require *additional* funds so that districts may implement them while still maintaining the essential elements of a sound basic education. For example, the Supreme Court below cited “teacher performance tools and measures” as one reform that could potentially offset cuts to state aid. (Order at 15.) Yet the State itself has acknowledged that the requirement

that teachers undergo additional observations and evaluations is one of several “mandates that represent the greatest challenges to districts in terms of financial burden and required time/human capital.” New York State Education Department, Office of School Operations, *Mandate Relief*, goo.gl/jzMO1j (April 19, 2012). See also New York State Education Department, *List of Mandates Frequently Raised in Discussions with School Administrators, Board Members, and the Public* (Aug. 4, 2010), goo.gl/zOj05m (identifying “annual professional performance reviews” as an unfunded mandate). If anything, the proliferation of unfunded mandates in areas such as teacher evaluation suggests that the amount of Foundation Aid approved in *CFE III* may have been insufficient to fund all of the programs and services identified by the Court of Appeals as critical to a sound basic education.

Where, as here, a remedy for a violation of constitutional rights “is not forthcoming from the political branches of government, then the courts must provide it.” *Brown v. State*, 89 N.Y.2d 172, 187 (1996). Students are guaranteed the opportunity for a sound basic education under the Education Article, the *CFE* decisions established the components that the State must provide and fund to ensure that opportunity, and the State’s enactment of Foundation Aid constituted a reasonable effort to comply with that mandate. The State’s subsequent defunding of Foundation Aid was not related to an assessment of student needs, and for that reason alone failed to comply with the Court of Appeals’ order.

II. The Supreme Court Erred in Failing to Examine the Causal Link Between Educational Inputs And Outputs.

In determining whether the “constitutional floor” for education had been met in the *CFE* cases, the Court of Appeals established a test that looks to three factors. First, the Court asked whether educational “outputs” suggested that the State had failed to provide children with “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 I*, 86 N.Y.2d at 316. Second, it asked whether the State had failed to provide the “inputs” needed to attain those goals, including “minimally adequate physical facilities. . . minimally adequate instrumentalities of learning. . . and minimally adequate teaching of reasonably up-to-date basic curricula.” *Id.* at 317. Finally, the Court required the plaintiffs to establish “a causal link between the present funding system and any proven failure to provide a sound basic education.” *CFE I* at 318. The causation prong does not require school funding plaintiffs to “eliminate any possibility that other causes contribute to that failure.” *CFE II*, 100 N.Y.2d at 923 (citation and quotation marks omitted).

The Supreme Court below declined to apply this test. The court did effectively concede that the Plaintiffs had made the required showing as to outputs, noting that outputs in the Maisto districts are “undeniably inadequate.” (Op. at 4.) Beyond this, however, the Court inexplicably abandoned the test articulated in the *CFE*

cases, stating only that “a determination of the issues in this case require [*sic*] this Court to look outside of the CFE framework.” (Order at 10-11.) In so doing, it entirely neglected to perform any causation or inputs analysis.

In fact the Maisto plaintiffs provided compelling evidence that cuts to Foundation Aid were strongly linked to the failure of the State to ensure that students in the plaintiff districts had an opportunity for a sound basic education. Thus, had the Supreme Court applied the *CFE* test properly, it would have found that increased funding in the form of maintaining the Foundation Aid plan could do what the test requires: “provide better teachers, facilities and instrumentalities of learning” to the Maisto districts, and in turn “yield better student performance.” *CFE II*, 100 N.Y.2d at 919.

The Foundation Aid freeze, the Deficit Reduction Assessment, and the Gap Elimination Adjustment created a total foundation funding for the 2012-2013 school year that was nearly thirty percent below the 2007 funding level. N.Y. State Assembly Committee on Education, *2012-13 State Aid Projections*, <https://goo.gl/C0wqmy>. The record below shows that these cuts directly caused the Maisto districts to slash their budgets. This, in turn, necessitated broad layoffs of staff, increased class sizes, pared-down curriculums, and cuts to programs and services designed to support at-risk students. (Plaintiffs’ Conclusions of Law at 18-27.)

Not only were these reductions in inputs directly caused by the cuts to Foundation Aid—they concern core elements of a sound basic education identified in the *CFE* decisions. In particular, the Court of Appeals has declared that teaching is “[t]he first and surely most important input” in providing a sound basic education, *CFE II*, 100 N.Y.2d at 909, and viewed “overcrowded classrooms” as one indication of inadequate inputs in this area. *Id.* at 914. Cuts to Foundation Aid caused all of the Maisto districts to fall short on this input, as they eliminated scores of staff positions, resulting in reductions of at least a tenth and in some districts a full quarter of each district’s staff (including teachers, teaching support staff, and social workers). (Plaintiffs’ Conclusions of Law at 18-19.) The cuts led to increased class sizes in many of the Maisto districts, which necessarily had a detrimental impact on the teachers’ ability to tailor instruction to every student. (*Id.* at 22.) Students in the Maisto districts have paid the price for these cuts, and have suffered either declining educational outcomes or outcomes that have stagnated well below the established State standards. (*Id.* at 27-37.)

In addition to the district-specific causation evidence the Maisto plaintiffs offered in the trial court, there is now a large body of empirical evidence supporting their claims. In finding that the plaintiffs had established causation in *CFE II*, the Court of Appeals referenced not just correlations between poor funding and poor outcomes in the plaintiff school districts, but also referenced general

research from other states such as Texas and Tennessee, on the link between funding and education outcomes. The Court found this research persuasive on the issue of causation even though at that time there was relatively little empirical research—particularly at the national level—on the link between funding and educational outcomes. *CFE II*, 100 N.Y.2d at 910, 912.

Today there is even more compelling research demonstrating the link between funding and educational outcomes. In the past decade, several studies have established not only that funding can “provide better teachers, facilities and instrumentalities of learning” and “yield better student performance,” *CFE II*, 100 N.Y.2d at 919, but that the causal link is robust—particularly for low-income students. Moreover, some of the best recent studies directly emphasize the impact of successful court-ordered school finance reforms on funding levels and student outcomes.

In 2015, a group of researchers with the National Bureau of Economic Research¹ studied funding levels and student outcomes following court-ordered school finance reforms since the 1970s.² The researchers concluded that finance

¹ The National Bureau of Economic Research is a ninety-six-year-old non-profit, non-partisan economics research organization. Twenty-six Nobel Prize winners in economics have served with the organization. National Bureau of Economic Research, *About the NBER*, goo.gl/8iD2Mp.

² C. Kirabo Jackson, et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, National Bureau of Economic Research, NBER Working Paper Series (Jan. 2015),

reforms prompted by court cases have significantly increased funding levels, and that these increases could be isolated as the cause of improved student outcomes. Specifically, the study found that “a 10 percent increase in per-pupil spending each year for all twelve years of public school leads to 0.27 more completed years of education, 7.25 percent higher wages, and a 3.67 percentage-point reduction in the annual incidence of adult poverty.” And, these improvements were more pronounced where spending increases were targeted to children from low-income families—children like those in the Maisto districts.

A 2016 paper³ by a separate group of researchers at the National Bureau of Economic Research attempted to isolate whether school finance reforms had any impact on National Assessment of Educational Progress (NAEP) scores—long considered the gold standard for measuring student achievement given their uniformity over many decades and the ability to use the data to compare different states.⁴ The authors of the 2016 paper specifically studied court-ordered school finance reforms where courts—like the Court of Appeals in the *CFE* cases—had found that students had the right to a funding system that was calculated to provide

goo.gl/K448UX. The Plaintiffs cited an earlier version of this study, and others, in Dr. Bruce Baker, *Analysis of Spending and Funding for a Sound Basic Education in the Maisto Districts* at 14-17 (Nov. 19, 2014).

³ Julien Lafortune, et al., *School Finance Reform and the Distribution of Student Achievement*, National Bureau of Economic Research, NBER Working Paper Series (Feb. 2016), goo.gl/JXJeDy.

⁴ *Id.* at 4.

them with a minimally adequate education. The researchers found that the court orders led to “sharp, immediate, and sustained increases in spending in low-income school districts,” including spending on critical inputs such as average instructional spending and capital improvements.⁵ And, they found that there was a strong causal link between the increased spending and improved student performance on NAEP math and reading assessments. Overall, the reforms could be linked to “between 0.12 and 0.24 standard deviations per \$1,000” in increased annual spending per pupil. The study notes that this effect is “large” and represents “at least twice” the impact found by the Tennessee STAR study.⁶ Notably, the STAR study was cited by the New York Court of Appeals in *CFE II* as persuasive evidence of the causal link between funding, class sizes, and student outcomes. 100 N.Y.2d at 912. The findings of the 2016 NBER study are therefore particularly relevant in examining causation in this case.

Recent research also consistently shows that funding increases that are devoted to increasing the size and quality of the teaching force pay dividends in terms of student achievement. The New Teacher Center’s TELL survey, which studies the relationship between teacher working conditions and student learning in a diverse array of states, has generally found that positive teaching conditions in such areas as adequate preparation time, facilities and resources, and professional

⁵ *Id.* at 1, 22-23.

⁶ *Id.* at 5-6

development are closely linked to improved student achievement.⁷ The Center has also found that comprehensive induction and support systems help to retain beginning teachers and further their positive impact on student learning.⁸ Yet, while New York has authorized funding for induction programs, the Legislature has declined to appropriate the authorized funds.⁹

Research further shows that increasing teacher salaries—a policy change which by definition requires sufficient funding—has a substantial positive impact on teacher recruitment and teacher quality, and in turn positively impacts student achievement. After Wyoming substantially increased school funding and teacher salaries to comply with its own Supreme Court’s school finance ruling, the state was flooded with new teaching license applications, and student achievement soared.¹⁰ Likewise, a 2008 study found that in New York, “teachers in districts with higher salaries relative to non-teaching salaries in the same county are less

⁷ New Teacher Center, *About Tell*, goo.gl/XT3zW3; New Teacher Center, *Cross-State Analysis of Results 2013-2014*, at 33 goo.gl/ywZKpu (collecting studies on link between teacher working conditions and student success).

⁸ New Teacher Center, *Support from the Start: A 50-State Review of Policies on New Educator Induction and Mentoring*, i-ii (Mar. 2016), goo.gl/Mg1uvD. See also Richard Ingersoll & Michael Strong, *The Impact of Induction and Mentoring Programs for Beginning Teachers: A Critical Review of the Research*, 81 *Rev. of Educ. Research*, 201-233 (June 2011), goo.gl/Ho259w.

⁹ NTC, *Support from the Start*, *supra* note 8, at 31.

¹⁰ Ben Wieder, *Teachers Increasingly Look to Mountain States for Jobs*, *Stateline* (Sept. 7, 2011), goo.gl/b5ftC4; National Center for Education Statistics, *State Profiles: Wyoming*, goo.gl/PgOxDA (reflecting percentile increases from 69% at or above basic to 90% at or above basic for 4th Grade math, and 64% to 81% for 8th grade math).

likely to leave teaching and that a teacher is less likely to change districts when he or she teaches in a district near the top of the teacher salary distribution in that county.”¹¹ And recent research confirms that excessive teacher turnover negatively impacts student achievement, and that these impacts are particularly felt in schools with more low-performing and minority students.¹²

By failing to apply the three-prong test established in the *CFE* cases, the Supreme Court neglected to perform any causation analysis whatsoever. In fact, there is ample evidence both that better funding leads to better investment in inputs and better student outcomes generally, and cuts to the Foundation Aid program were directly responsible for reductions in inputs—particularly staffing—that led to declines in student outcomes in the Maisto districts.

III. Neither the Appropriations Power nor Shifting Fiscal Priorities Can Extinguish the Legislature’s Duty to Provide an Opportunity for a Sound Basic Education.

In lieu of applying the central holdings and relevant legal test established in the *CFE* cases, the lower court found that the State in effect has *carte blanche* to sidestep any specific funding obligation “based upon the fluctuation of the State’s fiscal condition,” (Order at 12), as though the right to education in the Education Article is somehow subordinate to the Legislature’s authority over budgeting and

¹¹ Jan Ondrich, Emily Pas, & John Yinger, *The Determinants of Teacher Attrition in Upstate New York*, 36 Public Finance Rev. 36 112, 138 (2008).

¹² See Matthew Ronfeldt, et al., *How Teacher Turnover Harms Student Achievement*, 50 Am. Educ. Research J. 4 (June 2011), goo.gl/uyJNfl.

appropriations matters. This finding is not supported by existing New York Court of Appeals precedent or basic constitutional principles, and is contrary to the holdings of the high courts of other states that have dealt with this issue. Again the Supreme Court's reasoning would absolve the State from complying with *CFE III* or any subsequent school funding decisions this Court might issue, rendering the Education Article merely aspirational rather than an enforceable right of New York school children. This Court should reject the invitation to create an exception to the *CFE* cases that permits the Legislature to violate its constitutional duty in fiscally-lean times.

The U.S. Supreme Court has stated that "financial constraints may not be used to justify constitutional violations." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 370 (1992). *See also Missouri v. Jenkins*, 495 U.S. 33 (1990) (finding that a court could order a local government to levy taxes to fund its share of a desegregation plan). The precedent of the New York Court of Appeals, likewise, establishes that the rights of New York citizens cannot be violated solely because of a change in the State's financial condition.

In *Tucker v. Toia*, the Court of Appeals found that a statute that was "intended to prevent unnecessary welfare expenditures" by altering eligibility requirements for needy children to obtain public assistance violated the fundamental right in the New York Constitution to the "aid, care and support of the needy." 43 N.Y.2d 1, 7-

9 (N.Y. 1977). The Court affirmed the holding of the trial court, which had noted that “[a]s with other of the state’s obligations to its citizens, the state may not refuse persons seeking public assistance in violation of their constitutional rights and justify such action solely on the ground of fiscal responsibility or necessity.” *Tucker v. Toia*, 390 N.Y.S.2d 794, 803 (N.Y. Sup. Ct. 1977). The New York Court of Appeals reiterated this sentiment in the context of the rights of institutionalized persons in *Klostermann v. Cuomo*, 463 N.E.2d 588, 61 N.Y.2d 525 (N.Y. 1984) (“[The] defense [that there simply is not enough money to provide the services] is particularly unconvincing when uttered in response to a claim that existing conditions violate an individual’s constitutional rights.”). *See also Doe by Johanns v. N.Y. City Dep’t of Soc. Servs.*, 670 F.Supp. 1145 (S.D.N.Y. 1987) (“Concern, however, with the availability of resources is not part of the constitutionally acceptable decision-making process.”).

Similarly, this Court should not permit the State to rely on the presence of fiscal challenges to avoid its duty under the Education Article to “ensure the availability of a sound basic education to all children of the State.” *CFE I*, 655 N.E.2d at 86. The *CFE* cases made clear that a sound basic education has a cost, and that the State is responsible for providing the necessary funding. *CFE III*, 861 N.E.2d at 53. Budgetary considerations must yield to constitutional requirements.

Other state courts faced with similar questions in interpreting their own education articles uniformly agree that fiscal challenges cannot be used nullify the State's duty to provide an education that meets constitutional standards.¹³ For example, the Wyoming Supreme Court has held that “[b]ecause education is one of the state’s most important functions. . . [a]ll other financial considerations must yield until education is funded.” *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995), *as clarified on denial of reh’g* (Dec. 6, 1995). The New Hampshire Supreme Court has held that the State’s duty to provide a constitutionally adequate education “cannot be relieved” due to financial constraints. *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 754 (N.H. 2002). The West Virginia Supreme Court has held that any revisions to the education budget that are prompted by financial challenges must continue to “vindicate the constitutional mandate for a thorough and efficient public school system.” *West Virginia Educ. Ass'n v. Legislature of State of W.Va.*, 369 S.E.2d 454, 455 (W.Va. 1988). And the Supreme Court of California has held that financial considerations could not be used to justify the unconstitutional closure of a struggling school

¹³ While some states’ high courts have found that their education clauses do not establish the right to a sound basic education, or that particular funding levels do not fall below the required threshold, none of them has found that budgetary concerns can excuse the state from fulfilling a previously-established constitutional duty to provide a sound basic education. See Michael A. Rebell, *Safeguarding the Right to A Sound Basic Education in Times of Fiscal Constraint*, 75 Alb. L. Rev. 1855 (2012).

district six weeks before the end of the term. *Butt v. State of California*, 842 P.2d 1240, 1243 (Cal. 1992).

The New Jersey Supreme Court, which has addressed the constitutional duty to fund education more extensively than any other state's high court, is in agreement with these principles and has explicitly rejected the notion that the Legislature's appropriations power can absolve it of the duty to provide adequate funding to each school district. In *Abbott v. Burke*, 20 A.3d 1018, 1023-24, 1041 (N.J. 2011), the Court said that New Jersey could not use its appropriations power to shield itself from the constitutional duty to provide adequate funding to the public schools, because the State's underfunding violated a constitutional obligation rather than a statutory right, and had a "real, substantial, and consequential blow to the achievement of a thorough and efficient system of education." *Id.* at 1024. Relevant to the Court's holding, too, was the fact that—as in the *CFE* cases—the State itself had created the formula it was now underfunding. *See id.* at 1024-25.

This Court should follow the guidance of its sister courts here. Otherwise, it risks subjecting New York schools to what the New Jersey Supreme Court aptly referred to as a "structureless situation[] . . . where school districts ha[ve] no way to plan because they [can] not anticipate in advance what the State would choose to fund for education from year to year." *See Abbott*, 20 A.3d at 1040. This is precisely where the Maisto districts now find themselves. New York school

districts—particularly those with lower revenue-raising capacities—rely on the Foundation Aid provided by the State, and the underfunding of the program has created a scenario where school districts cannot anticipate how much state aid they will receive, cannot make accurate internal budgeting decisions, and cannot adequately staff their classrooms or provide for other based education services. Allowing the State to use its budgetary and appropriations powers to perpetuate this “structureless situation” is inconsistent with both the letter and spirit of the *CFE* decisions.

The court below found that it could not rule against the State because of the cyclical nature of the state budgetary process and the Legislature’s appropriations power under N.Y. Const. art. VII, § 7, which it claimed “make it impossible for the actions of a Legislature to bind future Legislatures with regard to its funding decisions.” Op. at 12. This finding overlooks the fact that the *CFE* decisions concerned interpretation of the Constitution, which by its very nature and purpose binds present and future Legislatures by constraining their power to make inconsistent enactments. *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803) (“an act of the legislature, repugnant to the constitution, is void. . . the constitution, and not such ordinary act, must govern the case to which they both apply.”). The Court of Appeals has, accordingly, chastised the Legislature for treating matters “within the scope of [its] constitutional duties” as “merely another government program

