



# NYCLU

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June 1, 2017

**Via First-Class Mail**

David G. Sciarra  
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60 Park Place, Suite 300  
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Re: *Maisto, et al. v. State of New York*  
Docket No. 524625; Sup. Ct. Albany Country Index No. 8977/08

Dear Mr. Sciarra and Ms. Lecker:

On May 25, 2017, the Court granted the New York Civil Liberties Union's Motion for Leave to Appear and File as Amicus Curiae. Enclosed please find two additional copies of the NYCLU's amicus brief.

Thank you for your time and please do not hesitate to contact me if you have any questions.

Sincerely,

Kevin Jason



Supreme Court of the State of New York  
Appellate Division – Third Department

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LARRY J. AND MARY FRANCES MAISTO, JULIE RODRIGUEZ, LORI L. COBB,  
THOMAS POPE, MARK AND JENNIFER PANEBIANCO, GRACE G. JOHNSON, Parents of  
Students in the Jamestown City School District as Representatives of Their Minor Children,  
CHRISTOPHER J. FARRELL, Parent of a Student in the Kingston City School District as  
Representative of His Minor Child, CURTIS L. BREWINGTON, SR., Parents of Students in the  
Mt. Vernon City School District as Representative of His Minor Children, NELLIE STEWART,  
ROBIN JOHNSON, EDWARD POPPITI, DAWN FUCHECK, PAMELA R. RESCH,  
SHARON CURRIE, LEONA M. FREE, ELIZABETH ROBINSON, ZSA ZSA HOLMES,  
TANISHA JACKSON, ALMETRA MURDOCK, TONIA PARKER, Parents of Students in the  
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RALPH, Parent of a Student in the Niagara Falls City School District as Representative of Her  
Minor Child, KELLY DECKER, Parent of a Student in the Port Jervis City School District as  
Representative of Her Minor Child, SAKIMA A.G. BROWN, Parent of a Student in the  
Poughkeepsie School District as Representative of Her Minor Child, ALESIA MCDANIEL,  
RHONDA ANGRILLI-RUSSELL, ZULIA MARTIN, Parents of Students in the Utica City  
School District as Representatives of Their Minor Children,

*Plaintiffs-Appellants,*

v.

STATE OF NEW YORK,

*Defendant-Respondent.*

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Brief for Amicus Curiae,  
New York Civil Liberties Union

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Dated: May 5, 2017

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## INTRODUCTION

This appeal presents important issues regarding the State of New York's constitutional duty to provide all children within the state with the opportunity to receive a "sound basic education" and the courts' responsibility to safeguard this right. The New York Civil Liberties Union, as *amicus curiae*, urges this Court to reverse the September 19, 2016 decision and order of the Albany County Supreme Court dismissing the complaint of the plaintiffs in this case, who are the parents of minor schoolchildren claiming that their children have received a constitutionally inadequate education. In dismissing the suit, the Supreme Court ignored Court of Appeals precedent. The court below erred by engaging in an analysis, at the current liability phase of the litigation, that failed to comport with the evidence-based analysis of causation and constitutional injury mandated by the Court of Appeals. Instead, the Supreme Court purported to apply a standard of reasonableness drawn from a remedial decision of the Court of Appeals. But, even in its application of this standard, the Court below relied upon inapposite facts for its determination.

In *Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 316 [1995] ["*CFE I*"], the Court of Appeals issued a landmark decision holding that the Education Article of the State Constitution "requires the State to offer all children the opportunity of a sound basic education" and that the State's failure to fulfill

this constitutional mandate would give rise to a judicially cognizable cause of action. Within this decision, the Court of Appeals also established a template for future fact-finders tasked with determining whether the State's funding regime does, in fact, deliver the opportunity of a sound basic education (*CFE I* at 317). Eight years later, in *Campaign for Fiscal Equity v State of New York*, 100 NY2d 893, 908-09 [2003] [*“CFE II”*], the Court of Appeals described the test that a court should perform to determine whether the State has met its responsibility. That test involves consideration of the specific resources made available to a school district (the “inputs”) and the performance of the district's students and schools (the “outputs”) (*CFE II* at 908). A court must then determine whether there is a causal link between the funding system and any proven failure to provide a sound basic education to the district's plaintiffs (*CFE II* at 919). After conducting a thorough evaluation in accordance with the trial court's framework, the Court of Appeals in *CFE II* concluded that inadequate funding deprived students in New York City of an opportunity to receive a sound basic education.

Despite a lengthy trial and sizable record, the Supreme Court in Albany County dismissed plaintiffs' action without an examination of plaintiffs' evidence and without an application of the template laid out in *CFE I* and employed in *CFE II*. Plaintiffs' evidence mirrored the factors found significant by the Court in *CFE I* and demonstrated poor performance and diminished funding in each of the relevant

districts. Notwithstanding this presentation of evidence specifically related to plaintiffs' districts, the Supreme Court directed its attention to the remedial measures adopted by the State in response to the New York City plaintiffs' claims in the *CFE* litigation. In this regard, the court below concluded that that the State's prior remedial steps eliminated the need to craft a remedy specific to the circumstances presented by the plaintiff school districts in this action. By focusing on the potential remedies of this suit and sidestepping an analysis of the evidence presented by the parties, the Supreme Court abandoned its responsibility to examine the constitutional liability of the State. This short-circuiting of the judicial inquiry was further compounded by the Supreme Court's use of an inappropriate reasonableness standard and the reliance on an inapplicable set of facts.

*Amicus* submits this brief because this appeal raises important issues regarding how school districts or parents may vindicate the constitutional rights of students to enjoy "the opportunity of a sound basic education." Without educational opportunity, virtually all facets of civic, economic, and social life may be rendered inaccessible to students like the plaintiffs. In the argument set forth below, *Amicus* contends that a sound understanding of the full import of the *CFE* decisions issued by the Court of Appeals requires this Court to reject the lower court's method for determining if a violation occurred; the lower court should have applied the analysis used in *CFE II* and should have examined inputs, outputs, and



potential causation. *Amicus* also contends that adopting the lower court's analysis will improperly impair future plaintiffs' ability to challenge the State's performance in providing an opportunity to receive a sound basic education. In addressing these points, *Amicus* adopts the arguments presented by plaintiffs and seeks to supplement and amplify those arguments.

### **INTEREST OF AMICUS CURIAE**

The New York Civil Liberties Union (the "NYCLU") is the New York State affiliate of the American Civil Liberties Unions. As such, the NYCLU is deeply devoted to the protection and enhancement of fundamental constitutional rights. Among the most fundamental of rights is the right, secured by the Education Article of the New York Constitution, to an opportunity for a "sound basic education." In view of that, the NYCLU submitted *Amicus Curiae* briefs to the Court of Appeals in 1995 and 2003, when the *CFE* cases were previously before the Court of Appeals.

### **ARGUMENT**

#### **I. The Court of Appeals Laid Out a Clear Framework for Evaluating Claims that the State Has Failed to Provide Students with an Opportunity for a Sound Basic Education, and an Evidence-Based Causation Analysis Is at the Heart of that Framework.**

The Education Article, upon which the plaintiffs' claims are based, promises "a system of free common schools" wherein "all the children of this state may be educated" (NY Const art 11, § 1). In the *Campaign for Fiscal Equity* ("*CFE*") line

of cases, the Court of Appeals gave specificity to that promise; it held that the Education Article requires that the State provide all children with the opportunity to receive “a sound basic education” (*CFE I* at 315), and it described the test that a court must perform to determine whether the State has met that responsibility. That test involves an analysis of the specific resources made available to a school district (the “inputs”), the performance of the district’s students and schools (the “outputs”), and whether or not these factors establish a causal link between the challenged funding system and the district’s failure to provide a sound basic education to its students (*see CFE II* at 908-25).

In *CFE I* and *CFE II*, the Court of Appeals considered whether or not the plaintiff, a not-for-profit organization advocating on behalf of New York City schoolchildren, had established that the State’s funding scheme for New York City schools resulted in a constitutional violation. In *CFE I*, the Court emphasized that it is the trial court’s responsibility in the first instance to determine “whether the defendants have met their constitutional obligation” by “evaluat[ing] whether the children in plaintiffs’ districts are in fact being provided the opportunity to acquire basic literacy, calculating and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors” (*CFE I* at 317-18). Plaintiffs must “establish a correlation between funding and educational

opportunity . . . a causal link between the present funding system and any proven failure to provide a sound basic education” (*id.* at 318).

In *CFE II*, the Court outlined exactly how a factfinder should proceed with such an evaluation. In that case, the trial court “took evidence on the ‘inputs’ children receive—teaching, facilities and instrumentalities of learning—and their resulting ‘outputs,’ such as test results and graduation and dropout rates” (*CFE II* at 908), ultimately finding that the necessary “causal link” between inputs and outputs had been established by showing that “increased funding can provide better teachers, facilities, and instrumentalities of learning . . . together with evidence that such improved inputs yield better student performance” (*id.* at 919). To come to this conclusion, the trial court considered the testimony of 72 witnesses and 4,300 exhibits (*id.* at 902), and it determined that New York City public schools provided inadequate teaching (*id.* at 909-11), inadequate instrumentalities of learning via deficient libraries and computers (*id.* at 913), and inadequate facilities in the form of class sizes that negatively affected student performance (*id.* at 912).

The Court of Appeals held that the trial court had appropriately weighed the relevant evidence and applied the test first articulated in *CFE I* for determining whether a constitutional violation had taken place (*id.* at 931). In doing so, it emphasized the central role of the courts in determining whether constitutional mandates have been met, noting that “[d]ecisions about spending priorities are

indeed the Legislature's province, but we have a duty to determine whether the State is providing students with the opportunity for a sound basic education" (*id.* at 920), and that "[c]ourts are . . . well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government—not in order to make policy but in order to assure the protection of constitutional rights" (*id.* at 931).

In 2006, the Court of Appeals decided a third *CFE* appeal, in which the plaintiffs challenged the specific remedy offered by the New York State Legislature for the funding inadequacies identified in *CFE I* and *CFE II* (*Campaign for Fiscal Equity, Inc. v New York*, 8 NY3d 14 [2006] ["*CFE III*"]). In that case, the Court held that, when a constitutional violation has been established and a remedy has been ordered, the courts extend deference to the legislature to fashion "reasonable" funding proposals to address the constitutional defect (*id.* at 29). While the Court ultimately found that the State's proposal to add \$1.93 billion in additional operating funds to New York City schools was constitutionally adequate, it also reaffirmed that *CFE II* recognized a threshold responsibility for "the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for them" (*id.* at 28 [citing *CFE II*, 100 NY2d at 925])).

**II. This Court Should Reverse the Supreme Court and Hold that the Supreme Court was Obligated to Adhere to the Template Established in *CFE I* and Applied in *CFE II* for Determining Liability.**

In dismissing this action and concluding that plaintiffs had failed to establish their claim, the Supreme Court bypassed a critical component of the analysis set forth by the Court of Appeals in its *CFE* decisions. Under *CFE I*, plaintiffs must “establish a correlation between funding and education opportunity . . . a causal link between the present funding system and any proven failure to provide a sound basic education” (86 NY2d at 318). This demonstration reflected the Court’s judgment “of what the trier of fact must consider in determining whether defendants have met their constitutional obligation” (*id.*). Through a seven-week trial, the *Maisto* plaintiffs thoroughly established that inadequate funding deprived students of a sound basic education in the plaintiff districts. Here, the lower court heard testimony from 37 witnesses and recognized that the parties had submitted “countless exhibits” and “voluminous pleadings” (*Maisto v State of New York*, Sup Ct, Albany County, Sept. 19, 2016, O’Connor, J., index No. 8997/08, at 5 [hereinafter “*Maisto Decision & Order*”]). Among other things, the evidence at trial demonstrated that the *Maisto* districts suffered from teacher shortages and shortfalls in the support staff and programming required to provide critical services to at-risk students. Moreover, the evidence revealed that the graduation rates in the *Maisto* districts were below the state average and far below the baseline

established by the State. Suspension rates in the *Maisto* districts far exceeded the state averages. The test scores indicated that the students in the *Maisto* districts failed to achieve proficiency on state exams at high rates. Much of what the plaintiffs demonstrated was conceded by the State or its experts.

Despite this lengthy trial record, the Supreme Court departed from the analysis mandated by the Court of Appeals and decided against examining those inputs, outputs, and the question as to whether they were causally related. Instead, in its sixteen-page decision and order, the Supreme Court devoted few words to plaintiffs' exhaustive presentation of evidence related to these factors. In doing so, it found that that the trial court is obligated to "look outside of the CFE framework" and toward various actions undertaken by the State after the *CFE* litigation concluded (*Maisto* Decision & Order at 10-11). This was incorrect.

Here, the court below skipped over the fundamental causation questions at the heart of the case: Is the state providing sufficient resources to provide a sound basic education; and are students in the *Maisto* districts receiving a sound basic education? And the court below mistakenly relied on the deference afforded to *remedies for established constitutional violations* to hold that the State's proposed funding scheme for the plaintiffs' districts could not be challenged. This approach put the cart before the horse, avoiding any consideration of the actual facts before it—of the inadequate inputs and the resulting failing outputs established by

plaintiffs' evidence—and instead holding that, since the State had previously crafted a funding system in response to the *CFE* litigation, the only question is whether that system is *reasonably capable* of providing a sound basic education at all. The court below never conducted the causation analysis for the *Maisto* districts mandated by the Court of Appeals in the *CFE* cases. And, it therefore never put itself in the position of evaluating whether a remedy should be or could be fashioned to address a constitutional violation.

The Supreme Court should have conducted an examination similar to the template introduced in *CFE I* and applied in *CFE II* because these cases still control. In 2011, the Third Department had occasion to examine different *CFE* related questions in this matter: (1) whether or not the legislature's enactment of Foundation Aid had addressed the deficiencies alleged by the plaintiffs, rendering the claims moot; and (2) whether the matter was ripe for review given that the implementation of Foundation Aid was in its nascent stages. Then, the Appellate Division affirmed the lower court's order denying the State's motion to dismiss the plaintiffs' claims (*Hussein v State of New York*, 81 AD3d 132 [3d Dept 2011]).<sup>1</sup> In doing so, it held that this action “must be permitted to proceed according to the course charted by the Court of Appeals” (*id.* at 134). In a prescient moment, this

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<sup>1</sup> Initially, and at the time of the earlier appeals, the case was known as *Hussein v State of New York*.

Court rebutted the State’s mootness argument, pointing to a hypothetical situation where the plaintiffs could “successfully demonstrate, based on available data, that even the planned increases in aid are not sufficient to enable the school districts to provide a constitutionally-guaranteed sound basic education” (*id.* at 137). In analyzing the ripeness question, this Court noted, “it would be premature for us to determine the merits of plaintiffs’ allegations that the present and contemplated funding levels of education in their school districts are inadequate to meet the constitutional standards established by the Court of Appeals in the CFE cases” (*id.* at 136). It concluded this point by stating, “[o]nly after discovery and the development of a factual record can this issue be *fully evaluated and resolved*” (*id.* [emphasis added and quotation marks omitted] [citing *CFE I* at 317]). Thus, based on its decision in the earlier appeal, it is apparent that this Court anticipated an examination of the inputs, outputs, and question of causation as compelled by *CFE I* and *CFE II*.

**A. The Supreme Court Incorrectly Replaced the Analysis from the Earlier *CFE* Decisions, which are Relevant at this Phase of the Case, with the Conclusion from *CFE III*, which is not.**

The lower court erred by replacing an analysis for determining if a violation occurred in the first instance with an examination of deference arguments reserved for the remedy stage. Specifically, the Supreme Court discussed at great length the limitations of the judiciary and the need to defer to the legislature on fiscal



questions. In doing so, it relied heavily on *CFE III*, the Court of Appeals decision from 2006 (see *Maisto Decision & Order* at 8-9 [citing *CFE III*]). While *CFE III* is undoubtedly precedential, the Supreme Court's reliance on that decision was misplaced. The argument for judicial deference within that decision should not be interpreted as a guiding principle at the causation stage of the proceedings. The Court of Appeals' language discussing the judiciary's limited role in assessing funding levels is a consequence of the unique procedural context of *CFE III*.

In *CFE III*, the Court of Appeals evaluated lower court actions that drastically changed the remedy proposed by the State after it had already been found to have violated the New York State Constitution. Following *CFE II*, the State was tasked with calculating the actual costs for providing an education that meets the constitutional minimum (*CFE III* at 21). The State calculated a figure but was unable to pass a bill reflecting this figure before the Court's deadline (*id.* at 24-25). In response, the Supreme Court convened a panel of referees to determine whether the steps taken by the State were in compliance with *CFE II* and, in essence, to evaluate the figures calculated by the State post-*CFE II* (*id.* at 25). The referees rejected portions of the State's methodology and ultimately recommended a level of funding almost three times as large as the one proposed by the State (*id.* at 26-27). The Supreme Court confirmed the referees' report and recommendations, which also included an additional fund reserved for capital

improvements (*id.* at 27). On appeal, the Appellate Division overturned the portions of the Supreme Court's order relying on the Referee Report and altering the State's methodology. However, the Appellate Division then directed the Governor and legislature to enact an appropriation measure similar to, but more substantial than, a measure advanced in one of the Governor's prior proposals (*id.*). The Appellate Division also directed the State to implement the capital improvement plan recommended by the referees (*id.* at 26-27).

The Court of Appeals ultimately approved the level of funding proposed by the State and vacated the portion of the order related to the capital improvement funding. In emphasizing the limited role of the courts, the Court of Appeals was addressing the complicated matter of determining remedies in cases where the judiciary had found funding to be constitutionally inadequate. At the same time, the Court of Appeals was careful to emphasize the judiciary's responsibility in *identifying* constitutional violations in the first instance. It noted, "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" (*id.* at 28 [citing *CFE II*]). In sum, a higher level of deference may be reserved for crafting remedies, but that deference does not mean that courts will abdicate their responsibility to determine whether a constitutional violation exists in the first instance.

In foregoing the analysis applied in *CFE II*, the Supreme Court improperly relied on principles of deference that are reserved for evaluating a fiscal judgment, not evaluating the constitutionality of a policy or practice. Despite the inapplicability of the *CFE III* decision, the Supreme Court used cautionary language from that decision to begin its analysis of the plaintiffs' claims. The Supreme Court wrote, "[w]ith CFE as a guide, it clear [sic] that the Court must walk a fine line when deciding cases of this nature, careful of the 'tension between [our] responsibility to safeguard rights and the necessary deference of the courts to the policies of the Legislature.'" (*Maisto Decision & Order* at 10 [citing *CFE III* at 28]). Within *CFE III* however, the referenced tension is explicitly related to the creation of fiscal remedies, not to the identification of constitutional violations.

The Court of Appeals noted:

The need for deference, *where appropriate*, is no less important for this Court than it is for the Judiciary as a whole. We are the ultimate arbiters of our State Constitution. Yet, *in fashioning specific remedies for constitutional violations*, we must avoid intrusion on the primary domain of another branch of government. We have often spoken of this tension between our responsibility to safeguard rights and the necessary deference of the courts to the policies of the Legislature. While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute . . . the manner by which the State addresses complex society and governmental issues is a subject left to the discretion of the political branches of the government.

(*CFE III* at 28 [citation omitted and emphasis added].) Courts possess a duty to identify violations of the State Constitution, and those rights under the Constitution

must retain substance (*see CFE II* at 940 [Smith, J., concurring] ["It is the responsibility of the State to offer the opportunity of a sound basic education, and it is the responsibility of this Court to determine whether the State is fulfilling its responsibility to the plaintiffs"]). Plaintiffs alleging violations of the Education Article already bear a heavy burden under the examination adopted in *CFE II*. This burden becomes practically insurmountable if the courts defer to the other branches without first addressing the question of compliance with constitutional obligations. The *CFE II* analysis provides plaintiffs an opportunity to support their allegations. Expanding deference to the State before a violation has been identified would impair this opportunity and significantly reduce the duty to address constitutional violations.

**B. Compounding Its Abandonment of the Proper Template for Determining Liability, the Supreme Court Incorrectly Applies an Unduly Low Reasonableness Standard that Forecasts the Potential Success of the State's Funding System Instead of Evaluating the System's Past Performance.**

The Court's improper reliance on *CFE III* was not limited to the scope of deference; the Supreme Court mistakenly used a reasonableness standard from *CFE III* to dismiss the plaintiffs' claims. Citing *CFE III*, the Supreme Court noted that its role was to "determine whether the State's funding mechanism is reasonable and rational, or if the State has failed to meet its constitutional obligation" (*Maisto* Decision & Order at 11). First, the Supreme Court was

incorrect to present its role as deciding whether the State actions were either reasonable or were in accordance with the constitution. As noted above, only the latter mattered for the question of liability. Second, the Supreme Court ultimately compounded its error by using reasonableness as a paradigm for the constitutional inquiry—it impermissibly looked to whether the State’s funding adjustment was reasonable to determine if the State met its constitutional obligation in the first instance. This sidestep of the appropriate framework is demonstrated by the Supreme Court’s distillation of its responsibility in this matter.<sup>2</sup> It wrote:

The *fundamental question*, then, before this Court is whether the State can alter or adjust the education reform plan that was put into place by changing the levels of funding for each school district based upon the fluctuation of the State’s fiscal condition, the needs of the school districts, the level of local contribution and federal funding for the school districts, and other competing issues that are considered in the development of the New York State budget, *and still deliver on its obligation to ensure that schoolchildren are provided the opportunity for a sound basic education.*

(*Id.* at 12 [emphasis added].) The Supreme Court’s framing of the issue is a clear departure from *CFE II* and the existing case law establishing how a lower court determines whether the State’s funding scheme allows an opportunity for a sound basic education. In assessing the constitutionality of the funding level, the lower court here relied on the funding system’s *potential* to provide an opportunity for a

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<sup>2</sup> Of course, it is also supported by the Court’s failure to conduct an analysis of inputs, outputs, and causation. As discussed above, the Court of Appeals has already used this type of analysis as the metric for determining if the State has met its constitutional obligation (*CFE I* at 317-18).

sound basic education to determine the system's reasonableness instead of performing any evaluation of the system's historical performance. As discussed above, *CFE II* demonstrated that school funding cases required a plaintiff to show the State's inputs, the characteristics of the relevant districts, and the causal relationship between funding and negative outcomes. Notably, there was no prospective component to the analysis, especially as it related to inputs and outputs. The Court of Appeals limited its analysis to the inputs and outputs established in the record and did not engage in projections of future success. Thus, the lower court erred when it ignored the plaintiffs' evidence of existing performance shortcomings and rested its conclusion on the potential success of the State's funding system.

Despite *CFE III*'s influence on the lower court's analysis, *CFE III* does not support the lower court's approach. In particular, the Court of Appeals' use of a reasonableness standard was entirely distinguishable. In *CFE III*, the Court of Appeals wrote,

In light of our language in *CFE II* and our jurisprudence as a whole concerning deference to the Legislature in matters of policymaking, it was incumbent upon Supreme Court to begin by making a finding as to whether the State's estimate of the cost of providing a sound basic education in New York City was a *reasonable* estimate.

(*CFE III* at 29 [emphasis in original].) Once again, the procedural context is crucial. The Court of Appeals highlighted the reasonableness standard at the

remedy stage of the litigation. At that point, the judiciary had already found the prior level of funding constitutionally inadequate. As a matter of logic as well as law, there can be no serious evaluation of the “reasonableness” of the remedy until a court has fully identified the scope of the constitutional wrong that requires remediation.

There is no support for the conclusion that an analysis akin to the one used in *CFE II* can be set aside in favor of a reasonableness test—an implicitly low standard. In fact, it is clear that any examination of reasonableness should only follow a determination of causation.

The Supreme Court’s analysis is wholly based on “reasonableness”—untethered to any analysis of what would be required to provide the plaintiffs a sound basic education—and only includes citations and references to *CFE III* (*Maisto* Decision & Order at 12-13). In light of the fact that this was the incorrect standard, the lower court’s order should be reversed.

**C. Even Assuming that *CFE III* and Its Reasonableness Test Were Appropriate, the Supreme Court Relied on the *Factual Findings* of the *CFE* Decisions, Which Were Specific to New York City, Instead of the Facts Established at Trial.**

Assuming, *arguendo*, that it was appropriate to replace a liability analysis for a remedy analysis and that a reasonableness standard was required, the Supreme Court erred further by failing to consider whether the funding system was reasonable for the plaintiffs before it. In other words, not only did the Supreme

Court fail to conduct an exhaustive factual analysis as demonstrated in *CFE II*, it also failed to apply facts from the *Maisto* districts in its improper reasonableness assessment. Throughout its decision, the Supreme Court discussed the reasonableness of the State's prior funding actions and decisions. This was either done in abstract or in relation to the collection of *CFE* decisions (*see, e.g., Maisto Decision & Order* at 11 ["Measuring the State's response to the determination in the *CFE* case is paramount to understanding and analyzing what is constitutionally required. These small city school districts do not take issue with the response from the State to *CFE*, but instead are critical of the actions taken by the State to reduce funding after Foundation Aid was enacted."])). However, the court below never examined the funding system's impact on the plaintiffs before it. Instead, it reasoned that the system must be adequate for the plaintiff districts because a similar system was found adequate for the New York City school district nearly a decade before (*see id.* at 13 [citing *CFE III* at 30-31])).

It was improper for the lower court to rely on prior factual findings relating to a separate, unconnected plaintiff class to dismiss the case. Here, the Supreme Court held that plaintiffs were incapable of demonstrating that the Foundation Aid funding established a constitutional minimum for providing a sound basic



education. Setting aside the fact that this was a nondispositive argument,<sup>3</sup> the lower court improperly justified its conclusion. It highlighted the Court of Appeals' conclusion that the general methodology in Governor Pataki's 2006 proposal for determining the level of aid for New York State's schools was reasonable. Because Governor Pataki's proposal would have resulted in a smaller increase in funding than what was enacted through the Foundation Aid budget, the lower court reasoned that the plaintiffs did not establish the Foundation Aid as a constitutional minimum for the plaintiff districts (*Maisto* Decision & Order at 13).

This result cannot stand. The Court of Appeals assessed the reasonableness of the State's funding system only as it pertained to funding New York City schools. The plaintiff districts were outside the scope of the *CFE* plaintiff class and, thus, outside the scope of the Court's decision. The Court of Appeals had no occasion to ascertain the reasonableness of the system for other school districts in New York State; it specifically referred to the New York City School district throughout the opinion (*see, e.g., CFE III* at 27). Indeed, in *CFE II*, the Court of

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<sup>3</sup> Contrary to what the Supreme Court noted, plaintiffs were never required to show that the 2007-08 level of Foundation Aid was the constitutional floor (*see Maisto* Decision & Order at 13). The Foundation Aid formula was created in the wake of *CFE III*. It uses objective criteria to direct State funds toward high needs districts. The current funding level falls short of the figure envisioned when the Foundation Aid formula was formulated in 2007. However, this shortfall is only one benchmark for the degree of inadequate funding. The constitutional floor could have been higher or even lower than the 2007-08 Foundation Aid allotment. Regardless, plaintiffs' Third Amended Complaint explicitly alleges that the provision of Foundation Aid—even before the State froze or reduced the amount—still left the *Maisto* districts with insufficient funding for providing an opportunity for a sound basic education (Third Amended Complaint ¶¶ 3b, 34a).

Appeals unambiguously rejected such an invitation to issue a statewide decision with the facts before it (*see CFE II* at 928 [“Here the case presented to us . . . is limited to the adequacy of education financing for the *New York City public schools*, though the State may of course address statewide issues if it chooses.”] [emphasis added]).

The court below committed an error by deciding a substantive question without first examining the facts accompanying the specific litigants’ arguments which, again, further compounded its departure from the appropriate analysis for liability and its use of an unduly deferential standard. Upholding the lower court’s analysis would require upending longstanding due process principles. In particular, plaintiffs’ challenge to the State’s system cannot be precluded merely because the judiciary has previously approved the general funding scheme as applied to other, unrelated plaintiffs. Doing so would, in essence, collaterally estop students in other school districts from raising any challenge to the current system, even if they were provided with an education that is inadequate. Moreover, adopting the Supreme Court’s approach would essentially render future challenges moot.<sup>4</sup> Here, the lower court approved the funding system without examining its

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<sup>4</sup> Adopting the lower court’s rationale would also violate the principles underpinning the prohibition against advisory opinions. This prohibition is well established: “[T]he ‘function of the courts is to determine controversies between litigants . . . They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function. This is not merely a question of judicial prudence or restraint; it is a constitutional command defining the proper role of the courts under a common-law system.’” (*N.Y. Pub. Interest Research Grp., Inc. v Carey*, 42

particular effect on the plaintiff districts and by relying on abstract notions of the system's potential. This is practically identical to the argument for dismissal that the State presented to this Court in 2011. As discussed above, *supra* Part II.A, the State in 2011 argued that plaintiffs' claims should be dismissed because the 2007 legislation was passed for the purpose of ameliorating the alleged defects and deficiencies. This Court rejected this position in 2011, and should reject its analogue today.

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NY2d 527, 529-30 [1977] [citing *In re Workmen's Comp. Fund*, 224 NY 13, 16 [1918] [Cardozo, J.]].) The lower court's reliance on the facts decided in prior litigation is prohibited by these principles, even in the context of school funding litigation. In CFE II, the Court of Appeals decided against opining on the propriety of a statewide remedy because it did not have evidence related to other New York school districts before it (*see CFE II* at 928 ["Courts deal with actual cases and controversies, not abstract global issues, and fashion their directives based on the proof before them."])).

## CONCLUSION

For the reasons cited above, the Court should reverse the judgment of the Supreme Court, Albany County, and remand the matter with instructions to undertake a factual analysis of the inputs, outputs, and possible causation consistent with *CFE I* and *CFE II*.

Respectfully submitted,



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