To be argued by:
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

CAMPAIGN FOR FISCAL EQUITY, INC., *et al.*,	:	
Plaintiffs-Respondents,	:	New York County
	:	Index No.: 111070/93
-against-	:	
THE STATE OF NEW YORK, *et al.*,	:	
Defendants-Appellants	:	

BRIEF FOR PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

This appeal arises from the failure of the Governor and the Legislature to obey a direct order issued by the Court of Appeals. Appellants ignore this extraordinary fact in their opening brief, insisting as they have throughout the 12-year course of this litigation that the courts must defer to the political branches.

The time for deference has long passed. The Court of Appeals in *CFE I* and *CFE II* clearly stated that the courts have both the authority and the responsibility to ensure that the Governor and the Legislature take whatever actions are necessary, including the expenditure of public funds, to provide New York's children with the opportunity to obtain a constitutionally adequate education.

In *CFE II*, the Court of Appeals presumed that its order would be followed by a "Legislature desiring to enact good laws" and it gave the State more than a one-year grace period to comply with its order. The Court's order required the State to determine the cost of providing a sound basic education in the New York City public schools; to implement reforms to the existing education funding system to ensure that every school in New York City has the resources necessary to provide the opportunity for a sound basic education; and to develop an appropriate accountability system.

The Appellants have admitted, and the public record confirms, what the Supreme Court found: the State failed to comply with the Court of Appeals' order by the July 30, 2004 deadline set by the Court. It is this failure that led to the Order now on appeal.

When the deadline for compliance passed, the Supreme Court appointed a distinguished Panel of Judicial Referees to conduct evidentiary hearings and make recommendations concerning the State's compliance and any necessary remedial measures. Adhering to this instruction, the Referees determined, *inter alia*, that the State had failed to determine the actual

cost of providing a sound basic education in New York City. The Referees then determined that an additional $5.63 billion in operating funds was necessary to provide a sound basic education and a one-time $9.2 billion capital expenditure was necessary to provide adequate classrooms, libraries, laboratories and other facilities. The Referees' findings and the Supreme Court's Order confirming the findings are fully supported by the record and must therefore be affirmed.

1. Operating Aid. With respect to increased operating aid, the record shows that, in response to *CFE II,* various education funding plans were proposed by the Governor, the Board of Regents, the New York City Department of Education, the State Assembly, and Plaintiffs-Respondents. The proposals were remarkably consistent. All of the proposals recognized the need to increase operating aid for the New York City schools in a range between $4.7 billion and $6 billion. ***Significantly, even the Governor proposed an increase of $4.7 billion, in addition to the recent increases in funding that the Appellants now claim should preclude any further judicial action.***

Thus, the record before the Referees demonstrated that the unmet funding need for the New York City schools, as determined by the New York State and City elected and appointed officials responsible for the managing and funding those schools, was at least $4.7 billion and could exceed $6 billion. These determinations of need were all made within the last year and take into account recent funding increases and governance changes.

The final figure of $5.6 billion recommended by the Referees and adopted by the Supreme Court, therefore, is not "exceedingly high" as Appellants now claim. It was derived using the same methodology Appellants favor and is consistent with all of the responsible estimates provided to the Referees, including estimates calculated by the nation's leading education finance experts. And it is not surprising in light of the extraordinary record of

resource inadequacy, educational failure and funding shortfalls recognized by the Court of Appeals in *CFE II*.

Although the compliance proposal submitted to the Referees by the Appellants called for an increase of $4.7 billion, Appellants now claim that this amount is essentially a gift from the Governor well in excess of the constitutionally required minimum amount of additional funding. Specifically, Appellants claim that the "State" determined that the actual cost of providing a sound basic education in New York City is $1.93 billion and that the courts must defer to this determination. ***This claim is false and its continued assertion by Appellants in the face of overwhelming evidence to the contrary is irresponsible.***

The $1.93 billion figure was never included in any official finding of any State board, commission or agency, and it was never adopted or enacted by the Legislature. Appellants have appropriated the figure through a cynical, litigation-inspired manipulation of a study whose authors refused to appear before the Referees and who explicitly stated that their study "does not recommend any particular spending level." The $1.93 billion figure is not a determination of the actual cost of providing a sound basic education in New York City and it is not the result of any action to which any judicial deference is due.

2. Capital Funds. The Referees recommended, and the Supreme Court ordered, the State to ensure the funding of $9.2 billion in capital projects over the next five years. The Referees' recommendation is based on an expert analysis of the cost of providing facilities necessary to comply with *CFE II*. Appellants essentially defaulted on this issue; they offered no competing analysis of need and no evidence to counter the analysis relied on by the Referees. Indeed, Appellants' own witness admitted that the City has unmet capital needs of "billions of dollars" and endorsed the methodology used in the analysis cited by the Referees. The current

state building aid formulas, which reimburse New York City over a 30-year period for only a fraction of its actual costs for new construction, clearly cannot ensure compliance with constitutional requirements.

Appellants do not seriously challenge the Referees' findings, avoiding any mention of the appropriate standard of review and admitting that the findings represent reasonable policy choices. Instead, more than two years after the Court of Appeals directed the State to take action, Appellants' principal argument continues to be about deference. Yet Appellants ultimately concede that continued deference is futile because the "badly divided" political branches have failed to meet the mandates of *CFE II*. In the face of this failure, Appellants admit that the courts must now determine "how much in the way of additional funds must be spent on education by the New York City school district." Brief for Defendants-Appellants ("App. Br.") at 46. The courts must also issue effective directives that will break the current compliance logjam and ensure that the constitutional rights of 1.1 million school children actually are enforced. The Supreme Court has accomplished both of these tasks. Its Order is fully supported by the record, is consistent with the estimates of the City and State officials charged with funding the New York City schools, and is faithful to the command of *CFE II*. More than a year has now passed since the Court of Appeals' deadline. The Supreme Court's Order must be implemented promptly and this appeal, therefore, must be denied.

FACTUAL BACKGROUND

The procedural posture of this appeal is unprecedented: The Governor and the Legislature have failed to obey an order of the Court of Appeals and, as a result, the Supreme Court has ordered the State to undertake specific curative actions, including providing substantial additional funding for the operational and capital needs of the New York City public school system.

There is no question that the State has defaulted. None of the acts and proposals cited by Appellants comes close to meeting the Court of Appeals' directives and, as the Appellants acknowledge, the political branches will not act until the courts have told them exactly what it is that must be done. In these circumstances, Appellants' repeated insistence on judicial deference is Orwellian.

A. The Court of Appeals' Decision in *CFE II*

On June 26, 2003, the Court of Appeals ruled that "New York City schoolchildren are not receiving the constitutionally-mandated opportunity for a sound basic education." *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 919 (2003) ("*CFE II*"). To remedy this constitutional wrong, the Court of Appeals ordered the State to: (1) determine the actual cost of providing a sound basic education in New York City; (2) reform the current system of financing school funding and managing schools to ensure that every school in New York City has 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. *Id*. at 930.

Recognizing the practical difficulties of compliance, the Court granted the State a one-year grace period, requiring the State to "implement" the necessary measures by July 30, 2004. *Id*. The Court also remanded the case to the Supreme Court "for further proceedings in

accordance with this opinion." *Id*. at 932. Significantly, the Court of Appeals expressly recognized the responsibility of the judicial branch to "safeguard . . . rights provided by the New York State Constitution, and order redress for violation of them." *Id*. at 925.

B. The State's Failure to Comply with *CFE II*

The State's failure to comply with *CFE II* cannot be seriously disputed. As Appellants admit on this appeal, "the Executive and the Legislature have been unable to agree on a comprehensive funding program that complies fully with *CFE II*." App. Br. at 54-55. The political branches, therefore, remain "badly divided" as to how much money is necessary to provide a sound basic education in New York City. *Id*. at 46. Even an extraordinary session of the Legislature called on the eve of the July 30, 2004 deadline failed to resolve these issues.

Indeed, it is now apparent that the political branches expect the courts to tell them how much money must be spent to provide a sound basic education in New York City. Both the Senate Majority Leader and the Speaker of the Assembly have acknowledged that the current political stalemate regarding funding can only be resolved by a direct order from the courts. After the legislature rejected the Governor's *CFE II* compliance proposal, Senate Majority Leader Joseph Bruno stated that the Legislature should "let the courts who created this situation . . . take a look at what they see is appropriate." *Passing the Buck*, Journal News, 2004 WLNR 16087086, May 2, 2004 at 8B. Earlier this year, Assembly Speaker Sheldon Silver noted that "[t]he court is going to have to resolve [the school finance impasse]. ***They're going to have to give the governor an order as to what he spends, plain and simple***." Michael Rothfeld, *School Funding Solution on Hold; State Lawmakers Say They Will Set Aside Resolving Court order to Focus on Passing Budget On Time*, NEWSDAY, 2005 WLNR 4415840, Mar. 22, 2005, at A24 (emphasis added). Senate Majority Leader Bruno likewise acknowledged that the Legislature has little reason to address remedial measures for *CFE II* because, "[t]here's no judgment." *Id.*

Although Appellants admit that the State has failed to implement the reforms required by *CFE II*, they insist that the State has complied with the Court of Appeals' direction to determine the actual cost of providing a sound basic education in New York City. Appellants repeatedly claim that the "State defendants" determined that an additional $1.93 billion in operating funds (above what was spent in 2002-03) is necessary to provide a sound basic education. *See, e.g.*, App. Br. at 2, 21. ***There is no evidence in the record to support this claim and the suggestion that this figure represents a determination by the "State," as required by CFE II, is plainly wrong.*** Indeed, Appellants admit in their brief that the question of "[h]ow much in the way of additional funds must be spent on education by the New York City school district" is an unresolved issue that has "badly divided . . . the Governor, Senate and Assembly." *Id*. at 46.

In fact, the $1.93 billion figure has been advanced in these proceedings for one reason only: it is the lowest figure that Appellants could find mentioned in the various studies and reports that were submitted to the Panel of Judicial Referees after the July 30 deadline passed. The undisputed facts reveal, however, that no elected or appointed State official ever endorsed that figure or determined that an increase of $1.93 billion would be sufficient to provide a sound basic education in the New York City public schools.

The record with respect to the $1.93 billion shows that in March 2004, Governor Pataki appointed the Zarb Commission in response to *CFE II.* The Zarb Commission obtained the services of Standard and Poor's ("S&P") to provide assistance in examining this issue.[1] S&P, however, was not charged with determining the cost of a sound basic education in New York

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[1] The State Comptroller, however, refused to approve a contract with S&P after determining that retaining S&P to provide an unbiased costing out study could create the appearance of a conflict because S&P was doing business with the State. Plaintiffs-Respondents' Supplemental Record on Appeal ("Supp. R.") at 175. S&P then agreed to provide assistance to the Zarb Commission without compensation. *Id*.

City. According to S&P, their charge was to "identify the spending levels of New York's better-performing school districts" and then to calculate equivalent levels of funding for the State as a whole. R.1039. ***S&P expressly noted that its work was not intended to determine "[h]ow much spending is adequate to provide an opportunity for a sound basic education."*** *Id.*

S&P eventually produced a report (the "S&P Study") that employed what is known as the "successful schools" methodology. Using expenditure, demographic and achievement data from every district in New York State, S&P compared the average expenditures in districts that are meeting certain specified achievement criteria to the average expenditure in New York City and statewide. From this comparison, and on the assumption that districts meeting these achievement criteria were providing their students with the opportunity for a sound basic education, S&P derived an estimated "spending gap" under each achievement scenario. R.1046-47, 1062-63.

It is important to note that the S&P Study did not produce a precise "spending gap" calculation either for New York State or New York City. Instead, S&P provided a model that could produce an extraordinarily wide range of "spending gap" calculations depending on what values were assigned to certain key variables including what additional costs are associated with educating children who live in poverty, the geographic cost of living and "efficiency" factors.

In the text of the Study, S&P included 16 different illustrative calculations derived from this model of the New York City "spending gap," broken down into two sets of eight different calculations. The lower set of calculations was derived by excluding the top-spending 50% of successful school districts from the analysis and using the average spending of the bottom-spending 50% of successful school districts. R.1058. The illustrative calculations included in the Study using this criteria resulted in resource gaps that ranged from $1.93 billion to $4.69

billion. The higher set of illustrative calculations that did not exclude the top-spending 50% of successful schools ranged from $3.99 billion to $7.28 billion. (Appellants inexplicably included only the lower set of calculations at page 16 in their brief.) The following chart combines Figures 15 and 16 from page 26 of the S&P Study (R.1063) and summarizes the 16 illustrative calculations of the resource gap found in the S&P Study for New York City:

		"Success" Criteria			
	Regional Cost Adjustment	**Top Performers**	**2006 Targets**	**2008 Targets**	**Regents Criteria**
All "Successful" Districts	New York Regional Cost Index	$6.72 billion	$6.62 billion	$7.28 billion	$5.98 billion
	Geographic Cost of Education Index	$4.66 billion	$4.66 billion	$5.33 billion	$3.99 billion
Lowest-Spending "Successful" Districts	New York Regional Cost Index	$4.69 billion	$4.05 billion	$4.31 billion	$4.10 billion
	Geographic Cost of Education Index	$2.53 billion	$1.97 billion	$2.37 billion	$1.93 billion

In addition to the illustrative calculations set forth in the text, S&P included a web-based "EdResource Calculator" in the Study that allows the user to test a wide range of values that yield resource gaps substantially above $7.28 billion.[2] ***S&P expressly stated that it "does not recommend any particular spending level."*** R.1039.

The Zarb Commission issued its report in March 2004 (the "Zarb Report"). Significantly, the Zarb Report does not include any cost estimate for New York City. Instead, the Report includes only a statewide estimate that adopted the lower ranges of the S&P study that were calculated by excluding the top-spending 50% of the successful school districts. R.988.

In July 2004, the Governor submitted to the Legislature his State Education Reform Plan. This Plan called for a $4.7 billion increase in education funding for New York City using a

[2] The calculator is available at http://pes.standardandpoors.com/nys/calc/SES.html.

combination of state, city and federal funding.[3] R.1148. The Plan, therefore, sought an increase that matched the ***highest*** of the illustrative calculations included in the low range of the S&P Study. R.1062-63.

The Legislature rejected the Governor's Plan and the July 30 deadline set by the Court of Appeals passed without compliance by the State. On August 3, 2004, the Supreme Court appointed the Panel of Judicial Referees to "hear and report with recommendations on what measures defendants have taken to follow the [Court of Appeals'] directives and bring this State's school funding mechanism into constitutional compliance insofar as it affects the New York City School System." R.28.

As described more fully below, the Referees sought submissions from the various parties concerning compliance. Appellants submitted to the Referees a plan (the "Defendants' Plan") based principally on the State Education Reform Plan that had been rejected by the Legislature. The Defendants' Plan again called for a $4.7 billion increase in operational spending for New York City. R.955.

Although Appellants asked the Referees to approve the Governor's proposed $4.7 billion increase, the Defendants' Plan as submitted to the Referees also included an argument that the State could meet its constitutional obligation by limiting the increase to only $1.93 billion, erroneously claiming that S&P had determined that a sound basic education could be provided for this amount. (Outside the courtroom, the Governor continues to advocate a $4.7 billion

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[3] Plaintiffs question whether the amounts of additional federal money that the Governor projects in this proposal would in fact materialize and whether the legislature would indeed require New York City to contribute a 40% matching share. The important point for present purposes is, however, that the Governor has recognized that the "actual cost of providing a sound basic education in New York City" *CFE II,* 100 N.Y.2d at 930, is $4.7 billion above present spending levels, whatever the actual city, state and federal contributions to that total turn out to be.

increase. *See, e.g.,* New York State Division of the Budget, 2005-2006 Executive Budget, at 31-32 (Jan. 18, 2005) *available at* http://publications.budget.state.ny.us/fy0506littlebook/lb0506.pdf. The Defendant's Plan, which was submitted after the *CFE II* compliance deadline passed, is the earliest document in the record in which anyone claims that that actual cost of providing a sound basic education is an additional $1.93 billion.

All of the arguments that Appellants now marshal in their brief to justify the $1.93 billion figure have been concocted by Appellants to hide the fact that this figure was chosen for one reason only: it was the lowest of the illustrative figures in the S&P study. ***Prior to the July 2004 deadline, no official of New York State claimed that this increase represented the actual cost of providing a sound basic education in New York City.***

In fact, no witness called in the proceedings before the Referees could testify about how the Appellants adopted the $1.93 billion figure as the cost of providing a sound basic education in New York City. Incredibly, even though Appellants now base their appeal principally on a demand for deference to the State's purported determination that an additional $1.93 billion is required to provide a sound basic education in New York City, they could not produce for testimony before the Referees the authors of the S&P Study in which the number appears. Indeed, when pressed by the Referees, Appellants were forced to submit an extraordinary letter explaining that S&P refused to appear voluntarily before the Referees, and Appellants never sought to compel their testimony. Supp. R.175-76. In addition, Appellants produced no one associated with the Zarb Commission or anyone else who could say that the Zarb Commission had made any determination as to the actual cost of a sound basic education in New York City.

Appellants called only one witness – a member of the Governor's staff – who claimed to have any first-hand knowledge of the Defendants' Plan. But that witness could not explain why

or how the Plan embraced the $1.93 billion figure. R.1978-79. Nor could he explain why the Governor had recommended an increase of $4.7 billion to the Legislature (the highest figure included in the S&P low range "resource gap" illustrations), while asking the Referees to limit the increase to $1.93 billion (S&P's lowest illustration). R.1978, 1998-2005. He could not reconcile the two figures in any way or explain what minimally required resources the $1.93 billion would secure and what non-essential resources would be secured with the proposed $4.7 billion. R.1991-92, 2004-05.

In short, no State official could show that the $1.93 billion represented a considered determination of the actual cost of providing a sound basic education in New York City. To the contrary, the record shows that the all of the State officials who considered this issue concluded that substantially more than $1.93 billion is required. The Board of Regents, as explained below, originally recommend an increase of $4.7 billion, and have now endorsed the trial court's $5.63 billion figure. R.5958, 5984. The Assembly proposed a $6 billion increase, and the Governor's actual legislative proposal, in contrast to his litigation position, sought a $4.7 billion increase. The belated adoption of the $1.93 billion figure for litigation purposes by nameless State actors (most likely attorneys) cannot satisfy the State's *CFE II* obligation.

C. The Panel of Special Referees

In its order of August 3, 2004, the Supreme Court appointed Hon. E. Leo Milonas (formerly a justice of this Court and Chief Administrative Judge of the State of New York), Hon. William Thompson (a former justice of the Appellate Division, Second Department), and Dean John D. Feerick (former Dean of Fordham Law School) as a Panel of Special Referees. Two days later, the Referees convened their first conference and subsequently conducted a series of hearings in September and October. Before the record was closed, the Referees heard the testimony of 12 live witnesses and accepted affidavit testimony from three witnesses. The

witnesses included the Mayor of the City of New York, the Chancellor of the New York City School District, representatives of the New York State Division of the Budget and the State Education Department ("SED"), and several of the nation's leading education finance experts. R.5838-40. Without objection from the parties, the Referees permitted the Board of Regents and the City of New York to appear before them and present testimony. The Referees also received extensive written submissions from the parties and the City of New York and the Board of Regents, as well as submissions from more than 20 *amici* organizations and individuals with knowledge of New York State and City education issues.

As the Referees made clear at their first conference, they encouraged the parties to submit whatever evidence or testimony was relevant to their inquiry and did not limit the parties' submissions in any significant way. R.5836.

At the initial conference, Appellants admitted what was obvious from the public record: the State had not complied with the mandates of *CFE II.* R.1435. The proceedings before the Referees, therefore, were largely concerned with what compliance actions should be taken to cure the ongoing constitutional violation. To this end, the Referees requested and received compliance proposals submitted by Plaintiffs, Defendants-Appellants, the City of New York and the Board of Regents. These proposals all called for increases in operational funding ranging from $4.7 billion to $5.6 billion. In addition, the record before the Referees included the Assembly's education reform legislation that provided for a $6 billion increase and an independent study conducted by two New York State education finance experts (Professors Duncome and Yinger) that called for $7.2 billion increase.

	Total Proposed Increase When Fully Implemented
Plaintiffs	$5.6 billion (R.35, 3471)
Governor	$4.7 billion (R.955)
Regents	$4.7 billion (Supp. R.103)[4]
City of New York	$5.3 billion (R.1307)
NYS Assembly	$6.0 billion (Supp. R.37)[5]
Profs. Duncome & Yinger	$7.2 billion (R.1379)

In addition, Plaintiffs-Respondents and the City of New York submitted proposals to provide additional funding for capital projects. Despite repeated requests from the Referees, Appellants chose not to provide any proposal regarding capital spending.

The Referees heard extensive closing arguments on November 1 and issued a 57-page Report and Recommendations on November 30, 2004 ("Report"). The Report recommended a four-year phase-in of an additional $5.63 billion in operational funds, measured in 2004-2005 dollars. In addition, the Referees recommended funding for $9.179 billion in capital improvements. The Referees also recommended that the State undertake periodic operation and facilities costing-out studies until constitutional compliance is achieved, and they recommended

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[4] The Regents' proposal called for an increase in state foundation aid for New York City of $3.87 billion over 7 years. If a 25% increase is assumed for special education, English language learners and other non-foundation aid and a $1.2 billion city share is assumed, the Regents' 7-year total would be approximately $6 billion, or $4.7 billion over the first 5 years, the precise figure proposed by the Governor.

[5] This figure includes a $3.87 billion increase in foundation aid over 5 years, a 25% increase above foundation aid to cover state aid for special education, students with Limited English Proficiency and other General Support for Public School programs, and a $1.2 billion additional New York City contribution.

certain enhancements to, but not a full overhaul of, the State's educational accountability structure.

The Supreme Court confirmed the Report and Recommendations in its Order dated March 16, 2005. In substance, the trial court's Order adopts the recommendations of the Referees and requires Defendants-Appellants to take all necessary steps to implement the Referees' recommendations within 90 days of the date of the Order. Accordingly, for purposes of this appeal, Appellants' arguments are effectively addressed to the findings and recommendations of the Referees.

D. Developments Since *CFE II*

Appellants argue in their brief that the courts should defer to the political branches because the public record shows that the Governor and the Legislature in recent years have moved to improve the quality of education in New York City, as demonstrated by governance reform and increases in State funding for the New York City public school system. As Appellants admit, however, the State has not met the requirements of *CFE II* and the Governor's plan, submitted after all of the funding increases they cite (App. Br. at 34) still calls for a $4.7 billion increase. R.955.

With respect to governance, nothing in the record demonstrates that the structural reforms that resulted in Mayoral control were sufficient to remedy the resource deficiencies identified by the trial court and confirmed by the Court of Appeals in *CFE II*. To the contrary, all of the compliance proposals submitted to the Referees, which were based on post-governance cost studies, call for substantially increased funding. Both the City of New York and the Board of Regents have identified serious continuing resource deficiencies and it is these deficiencies that form the basis for their cost estimates. *See* R.1301-40 (Plan of the City of New York to Provide a Sound Basic Education to All its Students); Supp. R.98-169 (Board of Regents' 2004-05

Proposal on State Aid to School Districts); R.5967-98 (Board of Regents 2005-06 Proposal on State Aid to School Districts).

With respect to funding, the recent increases fall substantially below all of the need identified in all of the compliance plans submitted to the Referees. The increases did not purport to satisfy any determination of the actual cost of providing a sound basic education in New York City, as required by *CFE II*, but continue to reflect the discredited "shares" approach that has been the driving force of the state funding system found to be constitutionally deficient in *CFE II*. *See* Regents 2006-2007 Conceptual Proposal on State Aid to School Districts (Aug. 9, 2005) at 6 (showing that New York City's share of total computerized State aid rose only from 37.19% to 37.98% from 2002-03 to 2005-06) *available at* http://www.regents.nysed.gov/2005Meetings/September2005/0905saa1.htm. (Sept. 2, 2005)). Thus, far from providing any basis for judicial deferral, the recent increases demonstrate that without a court order, the State will continue to rely on the political "shares" agreement, and New York City's schools will never receive the funds necessary to provide the opportunity for a sound basic education to all of its students.[6]

Moreover, the State's touted increase in operating funds directed to the New York City schools – $625 million over the 2004-05 and 2005-06 school years (App. Br. at 33) – amounts to only 11% of the $5.6 billion required by Referees and only 13% of the amount proposed by the

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[6] The State's political manipulations to maintain the "shares" agreement also explains why the State deferred the new building aid increase for NYC for a year (*see* discussion below at 31): if the city were to receive even a pittance more in 2005-06, the agreed upon percentage share allocation would have been upset. If the city does obtain a building aid increase in 2006-2007, the Legislature, without a court order, will undoubtedly cut funding to some other city program, making the touted increase illusory at best.

Governor in his State Education Reform Plan.[7] Most of these new funds should, in fact, be considered an inflation adjustment. Specifically, utilizing the New York Region CPI inflation rate index (4.1% for 2004 and 3.7% for 2005) adopted by the Referees in their calculations (R.5853), more than two-thirds of that "new money," approximately $434 million, simply covers inflationary costs; only $191 million represents a genuine increase.

Appellants also point to purported improvements in certain measures such as teacher certification and some standardized test scores to suggest that the State is now meeting its obligations to New York City students. Of course, it is reasonable to expect that the limited increases in funding and governance reform would have some positive effect on the New York City schools. But Appellants have not and cannot argue that these improvements have satisfied the State's obligation to ensure that every school in New York City has the resources necessary to provide a sound basic education.

Appellants' passing references to a few improvements do not begin to address the vast record of inadequacy identified in *CFE II* and the trial court's findings. With respect to teacher quality, for example, the decrease in uncertified teachers (App. Br. at 31), standing alone, fails to show whether qualified teachers are working in the city's neediest schools, one of the most important inputs into ensuring that the city's students can obtain a sound basic education. *CFE II*, 100 N.Y.2d at 909. Moreover, much of the reduction in the numbers of uncertified teachers results from the substantial portion of the teachers hired through the Teaching Fellows Program, in which individuals are deemed "certified" and are allowed to teach with some minimal mentoring even though they have not completed the coursework that is normally

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[7] Appellants also refer to the increase in State aid to New York City schools from 1997 to 2003-04. App. Br. at 34. These increases are irrelevant because the costing out studies identified needs as of the 2003-04 school year. R.291.

required for certification. R.5131. Indeed, the evidence before the Referees demonstrated that the four year retention rates of Teaching Fellows – 52% (R.5145) – approximates the 50% attrition rate for new teachers found by the trial court to be a significant impediment to achieving a quality teaching force in New York City's schools. *See Campaign for Fiscal Equity v. State of New York,* 187 Misc. 2d 1, 59 (Sup. Ct. New York County 2001) ("*CFE Trial*").

Similarly, with respect to test scores, even with recent improvements in certain test scores, the data shows that vast numbers of the city's students fail to achieve State standards. By Appellants' own admission, over 30 percent of elementary school students still score below minimum proficiency levels in math (R.5968), and nearly 40 percent of students remain below minimum proficiency in English Language Arts. App. Br. at 32 n.5. Moreover, the 8th grade English Language scores for city students have actually declined since 1999 (*see* http://www.nycenet.edu/daa/2005ela48/pdf/Summary_Report_2005_Grades_4_and_8.pdf) and the city's graduation rate has shown virtually no improvement in recent years. R.5143.

In short, the public record since *CFE II* provides no basis to conclude that the State is coming close to meeting its constitutional obligation to the New York City children. Instead, the public record shows that the Court's finding in 2003 that "New York City schoolchildren are not receiving the constitutionally-mandated opportunity for a sound basic education" remains true today. *CFE II*, 100 N.Y.2d at 919.

ARGUMENT

I. THE REFEREES' FINDINGS AND THE SUPREME COURT'S ORDER ARE SUPPORTED BY THE RECORD AND MUST THEREFORE BE AFFIRMED

Appellants' brief is tellingly silent as to the appropriate standard of review. As Justice DeGrasse properly noted, "[i]t is well settled that the report of a Referee should be confirmed if the findings therein are supported by the record." R. 15 (citing *In re Blue Circle, Inc. v.*

Schermerhorn, 235 A.D.2d 771 (3d Dep't 1997); *accord Merch. Bank of New York v. Dajoy Diamonds, Inc*., 5 A.D.3d 167 (1st Dep't 2004) ("The Special Referee's determination of damages is substantiated by the record, and accordingly was properly confirmed."); *Freedman v. Freedman*, 211 A.D. 2d 580 (1st Dep't 1995) ("[G]enerally courts will not disturb the findings of a referee so long as his or her determination is substantiated by the record."); *Namer v. 152-54-56 West 15th Street Realty Corp*, 108 A.D.2d 705, (1st Dep't 1985) ("The report of a referee should be confirmed if the findings therein are supported by the record.").

As this Court has recognized, appellate courts should give "due regard" to the findings of the trier of fact and should not overturn factual findings "unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence." *300 East 34th Street Co. v. Habeeb*, 248 A.D.2d 50, 54 (1st Dep't 1997); *see also Claridge Gardens v. Menotti*, 160 A.D. 2d 544, 544-45 (1st Dep't 1990); *Nightingale Restaurant Corp. v. Shak Food Corp*., 155 A.D.2d 297, 297 (1st Dep't 1989).

Appellants essentially concede that the findings of the Referees are supported by the record and that the findings and conclusions of the Referees reflect reasonable "policy choices." App. Br. at 58-60. And Appellants have not even attempted to argue that the Referees' findings "could not [have been] reached under any fair interpretation of the evidence." They cannot do so because the record contains substantial evidence to support the Referees' specific findings as to the amount of additional operational and capital funding necessary to ensure a sound basic education. In fact, the Referees determined the cost of providing a sound basic education by relying on the same methodology offered by the Appellants.

With respect to capital funding, Appellants failed to propose a remedial plan to address the facilities deficiencies identified in *CFE II*. Appellants' own facilities expert admitted,

however, that the City has substantial unmet capital needs. On this appeal, Appellants now belatedly seek to cure their default by claiming that changes in the building aid formulas will provide the necessary funds. But these changes do not satisfy *CFE II*. The Referees, therefore, properly adopted the BRICKS capital funding plan, which was specifically designed to eliminate the constitutional violations identified by the Court of Appeals.

A. The Referees' Findings Regarding Operating Aid Are Supported By the Record

The record before the Judicial Referees at the conclusion of three months of extensive hearings and submissions consisted of the S&P cost study, which set forth a range of possible adequacy gap figures but no conclusions or recommendations; an extensive costing-out study submitted by the Plaintiffs that recommended an increase of $5.6 billion; cost analyses prepared by the Regents and the City of New York that called for operating aid increases of approximately $4.7 billion and $5.3 billion respectively; and an independent cost study undertaken by two New York State education finance experts that called for an increase of $7.2 billion. R.1379.[8] The record also established that the Governor publicly took the policy position that New York City's operating aid should be increased by $4.7 billion and that the Assembly had enacted a plan which called for a $6 billion increase. Certainly a record showing such a convergence among analyses conducted by the State and City education officials and leading education finance experts supports the Referees' findings.

Throughout their brief, Appellants assert that the Referees ignored Appellants' evidence of need and relied instead on the evidence of need submitted by Plaintiffs and the City of New York. *See, e.g.*, App. Br. at 60. On this record, the Referees clearly would have been justified in

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[8] Amici John Yinger and William Duncombe both serve on the faculty of The Maxwell School of Syracuse University, Yinger as the Trustee Professor of Public Administration and Economics and Duncombe as Professor of Public Administration. R.1341.

adopting the cost study undertaken by Plaintiffs' experts[9] and ignoring Appellants' confusing and inconsistent position altogether.[10] In fact, however, as the Referees' Report makes clear, the Referees carefully considered the work of the Zarb Commission, relied on by Appellants, and accepted much of the "successful schools" methodology that was employed by S&P on behalf of the Commission. Indeed, the Referees' Report focuses primarily on the successful schools methodology. R.5844-45.[11]

Employing the successful schools methodology, however, did not compel the Referees to accept Appellants' litigation-inspired selection of one illustrative calculation from among the many included in the S&P Report. Nor did it compel the Referees to adopt any the particular values selected by Appellants to produce that calculation.

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9 The AIR/MAP Study endorsed by the Plaintiffs had been undertaken by two of the country's leading expert firms; two of the principals of one of these firms, Dr. James Smith and Dr. James Guthrie of MAP, had actually testified on behalf of the *State* at the CFE trial. The AIR/MAP study emphasized the "professional judgment approach" to costing out a sound basic education. This methodology uses the judgment of experienced educators to determine the specific resources and programs necessary to give students an opportunity to meet specified performance standards. The AIR/MAP Study used ten panels of educators to define the specific instructional components deemed necessary to meet state standards for diverse groups of students in various educational settings. Economists then determined the price of each of the identified components.

10 The State's two expert witnesses, whose testimony largely focused on the methodological validity of the successful school district approach utilized by Standard & Poor's, were themselves confused about the figures that the "State Plan" actually proposed. One of them read the State's Plan as proposing a $6 billion increase for New York City (R.1938), and the other assumed that the Governor's $4.7 billion proposal was the state's litigation position. R.3921.

11 Appellants also excoriate the Referees for adopting the Regents standard used as the outcome measure in the AIR/MAP Study rather than performance on a series of Regents examinations, the outcome standard used by S&P. App. Br. at 59. Aside from the fact that the two standards operationally are virtually the same, as Appellants' own witness acknowledged (R.2141; *see also* R.2771-72, 2974-75), even assuming *arguendo* that there is any difference in these standards, the Referees derived their $5.63 billion figure from the S&P methodology and used the results that emerged from the AIR/MAP Study only as a confirming benchmark. R.5853, 5856.

As described above, Appellants' current assertion that the $1.93 billion calculation represents "the actual cost of providing a sound basic education in New York City" is baseless. The $1.93 billion figure does not reflect the determination of any State actor or the State as a whole. It is a figure that has never been publicly adopted by any State official; it is at odds with the public positions of the Board of Regents, the Governor and the Assembly; it has been explicitly rejected by the Legislature; and not a single witness testified with personal knowledge of how that figure came to be adopted as part of Appellants' remedial plan.

In the absence of any evidence that the $1.93 billion calculation now embraced by Appellants in these remedial proceedings represented an actual policy decision or action of the State, the Referees properly undertook their own analysis to determine whether and how to utilize the S&P model. They adopted the model's successful school district methodology, and recommended the cost figures that emerged from a careful application of that methodology to the facts of this case. In doing so, the Referees rejected three methodological assumptions that Appellants had adopted to justify the $1.93 billion figure: (1) the use of an arbitrary "cost efficiency filter," (2) the use of a poverty weighting figure that was based on national, rather than New York State data; and (3) the use of an out-of-date regional cost index.[12]

After making these corrections, the Referees applied the successful schools methodology to find that an operating aid increase of $5.63 billion is necessary to provide a sound basic education in New York City. The Referees included this figure in their recommendation, noting the "significant support [of the AIR/MAP, Regents and City proposals] in confirming our

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[12] On appeal, Appellants have dropped their objection to the updated geographic cost of living index recommended by the Referees. Accordingly, this issue will not be discussed any further in this brief.

conclusion that providing the New York City District an additional $5.63 billion in annual operations funding is both necessary and appropriate. . . ." R.5856.[13]

1. The Trial Court Correctly Rejected the State's Flawed "Cost-Reduction" Filter

The Referees properly rejected Appellants' 50% "cost reduction filter" because the evidence presented – including testimony from Appellants' own witnesses – conclusively established that the filter served simply to artificially manipulate the S&P data to reduce the resource gap estimate. It was based on no legitimate analysis of how successful districts actually spent their money. The record fully supports the definitive conclusion that:

> The use of the 50% cost reduction filter proposed by the State was not supported by the evidence in the record. Indeed, there was no evidence whatsoever indicating that the higher-spending districts excluded from the State's costing out analysis by this 50% cost reduction filter were in fact inefficient. Nor was there any evidence indicating that this 50% cost reduction filter is generally accepted by experts in education finance. ***To the contrary, it was even criticized by the State's own expert, Dr. Palaich, who testified that his firm would not use it.***[14]

R.5844 (emphasis added).

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[13] Appellants' response to the Referees' reference to the similarity in cost estimates of four separate cost analyses is to turn logic on it head and assert that, because Appellants' $1.93 billion estimate is so far from all of the other proposals submitted, all of the ***other*** costing out studies must be flawed. App. Br. at 73. Far from refuting the Referees' conclusion, Appellants' bizarre argument only underscores the fact that their estimate reflects nothing more than a litigation strategy supported by none of the cost studies in the record.

[14] The Referees noted that Dr. Palaich admitted that, "[i]f we were asked to do [a cost-effective filter], we would do a different filter system." R.5848, 2249. When asked directly if he would use a 50% filter, he responded "[N]o, I would not use it." *Id.* The Referees also noted that neither of the two other education finance experts who testified, Dr. Berne and Dr. Parrish, ever used or would recommend use of this costing out filter. *Id.*; *see also* R.3006-07, 3554-55; R.2792-93.

As the Referees noted, the use of this filter excluded from the sample virtually all of the districts in the two counties – Westchester and Nassau – that border New York City. These two counties have proportionately more students who are not English proficient than other counties in New York State outside of New York City, and for these reasons are most similar to New York City in their expenditure needs. *See* R.5846.[15]

No education finance expert at the trial – and in fact, no education finance expert opinion published in the lengthy literature in this field has ever endorsed a 50% "cost reduction filter" – because the use of a "cost reduction filter" contravenes the core concept behind the "successful school district" methodology.[16] R.2794, 2239-40, 3555. This methodology, according to Appellants' expert Dr. Palaich, "is based on the simple premise that any district should be able to be as successful at meeting a set of objectives as those districts currently meeting those objectives provided that every district has the same base level of funding that has been available to the successful districts." R.3877. In other words, once all of the successful districts have been identified, the average of their expenditures – with adjustments for relative numbers of students

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[15] Appellants' argument that "application of the regional cost adjustments and student needs weight factors will correct for the [omission of most downstate successful school districts from the sample]" (App. Br. at 67) demonstrates their lack of understanding of how the successful school district methodology works. In the successful school district methodology, these factors are applied to a base figure that is drawn from an average state-wide sample. If the "high spending" downstate districts are omitted from the sample, the base figure will not fairly represent average statewide costs of successful performance and arbitrarily will be skewed too low.

[16] The Referees found that the only prior use of a 50% cost reduction filter anywhere in the country was "in New Hampshire, where a State Legislature legislative committee, seeking to drive costs down to a pre-determined amount, recommended the use of a 50% cost reduction filter. But that committee's recommendation . . . did not come from any education finance experts." R.5847. Although the concern of a legislature or a governor for bottom line costs is understandable, that concern does not justify the use of procedures that compromise the integrity of professional cost studies and undermine the constitutional requirement to determine the "actual" costs of providing the opportunity for a sound basic education.

with special needs and regional costs of education – is accepted as the actual cost of providing the opportunity for a sound basic education. R.2161.

Tampering with the average cost figure that emerges from the full range of successful school districts fundamentally undermines the entire methodology. The "successful school district" methodology does not focus on why certain districts are, in fact, more successful than other districts: the methodology rests on the premise that by averaging the expenditures of all of the successful districts, the full range of successful practices will have been captured. R.4650-51. The arbitrary elimination of 50% of the successful districts excludes from the calculations both the varying demographics of those districts and the educational practices that may explain the success of those districts, thereby preventing the capture of the full range of successful practices and distorting the average cost. Analysts who believe that a cost study should focus on actual specified efficient educational practices will utilize the professional judgment methodology, which is geared to do this,[17] and not the successful school district methodology.[18]

Nothing in the record supports Appellants' suggestion that the 50% cost filter is the only way to address inefficiency in costing out studies. All of the costing out methodologies address efficiency. For example, the AIR/MAP professional judgment methodology utilized in Plaintiffs' study includes repeated instructions to the professional panels emphasizing that their program designs should only be ones that they would reasonably expect to be adopted and

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17 *See* n.9 above.

18 Some successful school studies have eliminated a very small proportion of the successful schools, *at both the top and the bottom* of the list, as potential statistical outliers. R.3007. This 5% outlier process is, in fact, the filter that Defendants' witness Dr. Palaich and his company regularly use. R 2238. The Referees requested that such an outlier analysis be done with the S&P data. After S&P refused to do the analysis (Supp. R.172-73), Plaintiffs' expert, Dr. Frank Mauro, did the calculations and found that the basic S&P (non-cost reduced) adequacy gap figures would *increase* by 1-2%, if both the top an bottom spending 5% districts were eliminated. R.5848 n.17.

funded by a school board or a legislature (R.482), and it includes multiple levels of cost effectiveness review. R.305, 315, 2757-58. To assure the cost-effectiveness of final cost recommendations, many education finance experts, including Appellants' expert Dr. Palaich, combine methods or compare the figure that results from one study with the outcomes of other studies that used different methodologies. R.1215, 2206-07, 2750-51. That, of course, is precisely what the Referees did here.

Appellants' argument that the Regents employed a 50% cost effectiveness filter in developing their own estimate of the amount of additional funds necessary to provide a sound basic education in New York City (App. Br. at 64-66) provides no basis to question the Referees' findings. First, the Regents have expressly endorsed the findings of the Referees. R.5986. Second, the Regents' own analysis, in which the 50% filter may have been utilized,[19] resulted in a proposal for a $4.7 billion increase in funding for New York City, substantially above what the Appellants now propose. Appellants cannot have it both ways – seeking to embrace one component of the Regents' study while ignoring its conclusions.

2. The Trial Court Properly Rejected the 1.35 Poverty Weighting.

The 1.35 weighting Appellants urge was used in the S&P Study as an illustrative variable. The S&P Report clearly stated, however, that it "does not explicitly recommend a particular set of weightings." R.1045-46. As the State admits (App. Br. at 69-71), the 1.35 weighting was drawn from a review of national research literature and has no demonstrable relationship to the actual needs of students in New York City.

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[19] Whether the Regents used a 50% filter as part of their costing-out methodology or as a policy position to offset the impact of the higher poverty weightings they endorsed is not clear from the record. Most of the information in the record on this issue was provided by an affidavit and accompanying materials submitted by Deputy Commissioner James Kadamus in January 2005 (R.5956-96) long after testimony had been concluded. Plaintiffs had no opportunity to cross-examine him regarding these issues.

The Referees found that "the evidence in the record indicated that such nationally-derived weightings generally result from guesses or policy decisions based on the amount of available funding and are essentially arbitrary and do not reflect the actual costs of providing adequate educational opportunities to students with special needs." R.5849. The State's own experts agreed that the State's proposed 1.35 weighting had no relationship to the cost of educating economically disadvantaged students in New York City (R.2252-53) and that the 1.35 weighting represented "backward mapping from current reality." R.1942.

Rather than rely on abstract national literature, and "other states' political compromises" (R.1366, 5849 n.20), the Referees focused on New York State data compiled by the Regents and the implicit weightings in the empirically grounded New York Adequacy Study undertaken by the AIR/MAP team.[20] R.5850. This New York data takes into account special circumstances of the New York City school district such as "an especially heavy concentration of high-need students, very low graduation rates, large classes and a disproportionate number of schools in need of improvement" (*id.*), for which generalized national statistics do not apply.

In recommending a 1.5 weighting, the Referees utilized the lowest of the range of figures recommended by the Regents. The Regents had concluded that weightings of between 1.5 and 2.0 were appropriate depending on the concentration of economically disadvantaged students in

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[20] Appellants grossly mischaracterize the testimony of Plaintiffs' expert Dr. Parrish regarding this point. Dr. Parrish did not affirmatively state that AIR/MAP's implied weighting "would be at a lower level" than 1.35. App. Br. at 67. Dr. Parrish's testimony was that, although AIR/MAP had not done these types of calculations, he assumed that their implicit findings would be below the "100% poverty weighting used by the regents and the 120% poverty weighting used by Duncombe and Yinger." R.3482. The technical calculations regarding the implicit weightings for the AIR/MAP study were, in any event, not done by Dr. Parrish – who clearly stated he had not undertaken any such calculations (R.3481) – but by Professors Duncombe and Yinger, who determined that the implicit weights were 1.81 for elementary school students, 1.37 for middle school students and 1.49 for high school students and by Dr. Frank Mauro who calculated an overall aggregate weighting of 1.7. R.1370, 4850, 5850-51.

a district. R.2658-2659; Supp. R.163. This weighting was also below the 1.7 implicit weighting for poverty students in the AIR/MAP study. R.5851.

In short, no credible evidence in the record exists to demonstrate that a 1.35 weighting approximates the actual cost of providing sufficient resources for poor children in New York City. The Referees' use of a conservative 1.5 poverty weighting[21] is based on available New York data and is supported by the record.

3. Further Costing-Out Studies Are Necessary Until All Students Receive the Opportunity for a Sound Basic Education

At the present time, no one can foresee when sufficient funding and satisfactory reforms will be in place to assure all students in New York City the opportunity for a sound basic education. Thus, the Supreme Court ordered the State to undertake a new costing-out study in 2008 and every four years thereafter until full compliance is achieved. Such studies may show that additional funds are needed, that then current funding levels are sufficient, or even, perhaps, that improved governance and accountability reforms would permit funding levels to be reduced. Appellants agree that such a study should be done in 2008, but they object to the possibility of additional studies being done thereafter. *See* App. Br. at 90. If constitutional compliance is achieved by 2008, under the trial court's order, no further studies need thereafter be conducted. But if compliance has not been realized, there is no logical basis for Appellants' assertion (without citation of any precedent or authority) that no further analysis of the system's constitutional needs should be done.

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[21] Although noting that national evidence presented by the State's expert would justify increasing the weighting for students who are English Language Learners from 1.2 to 1.5, the Referees took the more conservative approach of preserving the State's 1.2 E.L.L. weighting. R.5851 n.26. The Referees also accepted the State's 2.1 weighting for students with disabilities. *Id*., n.27.

Appellants also object to "lock[ing] the State into the successful school-district and professional-judgment methodologies approved by the Referees" *id*., but the actual wording of the trial court's order already meets this objection. It provides that "if the Regents, with the consent of defendants, determine that alternative methodologies or modified versions of the professional judgment panels or successful school district methodologies are more appropriate, such alternative or modified methodologies, may be utilized." R.8-9. The Referees directed that both of the major costing out methodologies be used in order to ensure that, in accordance with the best professional practice and to promote cost efficiency, at least two, rather than a single, methodology should be used in any future studies. R.5869.

Finally, Appellants object to the fact that the trial court order empowers the Regents to design and supervise these costing out studies. *See* App. Br. at 90. The ostensible basis for this objection is that putting the Regents in charge of such studies deprives the Executive and Legislative Branches of their budget-making authority. Undertaking analyses of the expenditure levels needed to support educational programs clearly is an appropriate statutory and constitutional responsibility of the Regents. N.Y. Educ. Law § 207 (2005). Indeed, the Regents each year already undertake a cost analysis in their annual State Aid Proposal. *See, e.g.,* R.5967. The Supreme Court's order merely regularizes this process and ensures that the cost analysis performed by the Regents complies with state of the art professional practices.[22]

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[22] Both the Referees and the Supreme Court sensibly recognized that, as practical matter, the City school system cannot absorb the entire $5.6 billion increase in aid that they recommend all at once. The Supreme Court's order therefore calls for the additional aid to be phased in over a period of four years. A longer period would adversely affect lives of 1.1 million school children. Although the State argued for a 5-year phase-in period below, it has apparently dropped its objection to the four year phase-in period on appeal, perhaps recognizing that its defiance of the Court of Appeals mandate has already delayed implementation by at least a full year.

B. The Referees' Findings Regarding Capital Needs Are Supported By the Record

In the proceedings below, Appellants claimed that *CFE II* required no increase in capital funding. R.5863. Accordingly, Appellants failed to present any plan to meet the urgent needs to eliminate overcrowding in the New York City public schools, to reduce class sizes and to provide sufficient laboratories, libraries and auditoriums. As the Referees specifically found, Appellants essentially defaulted on this issue. R.5863. In contrast, Plaintiffs submitted an extensive capital funding plan, Building Requires Immediate Capital For Kids ("BRICKS"), that was designed by a 22-person expert task force specifically to address the particular capital funding issues identified in the Court of Appeals *CFE II* decision. Based on the extensive testimony presented in support of the BRICKS plan – including Appellants' own facilities expert's acknowledgment that the methodology and general conclusions of the BRICKS proposal were sound – the Referees and the trial court adopted BRICKS' call for $9.179 billion in additional capital funding to be phased in over a five year period. R.5864-67.

On appeal, Appellants have dramatically changed their position. They now concede that the Court of Appeals' order requires additional capital funding to meet immediate constitutional deficiencies. *See* App. Br. at 78, 80-81.[23] Furthermore, implicitly acknowledging that the building aid program as it existed at the time of trial cannot meet these needs, Appellants now

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[23] The Court of Appeals' first directive in *CFE II* required the State to ascertain the "actual costs of providing the opportunity for a sound basic education." Despite the plain meaning that "actual costs" includes *all* costs, *i.e.* both operating costs and capital facilities costs, the State below denied that the directive covered capital facilities. R.5863. In an attempt to save face on this obvious misreading of the Order, the State now concedes that it must consider capital costs, but finds justification under the *second CFE II* directive. App. Br. at 81. With this admission, the State now agrees that "[i]t is undisputed that, to bring the City's schools into compliance with *CFE II*, capital expenditures will be necessary to reduce class sizes and overcrowding and to recapture displaced library and science laboratory space." *Id*. at 78.

claim that "the State's building aid program as enhanced by recent legislation . . .will produce compliance with the Court of Appeals' directive." App. Br. at 81. The recent legislation relied upon by Appellants (*id.*), L. 2005, ch. 57, Part L § 12, 12(b),[24] provides at best a minor increase to New York City. Moreover, the Legislature postponed the effective date of these changes for at least a year (*id*.), making it unclear whether the slight increase in aid it promises will ever be delivered.

Appellants' brief fails to describe in any detail the statutory revisions, which were enacted months after the record closed in the proceedings below.[25] There is, therefore, nothing in the record or even in their post-trial briefs to substantiate their new claims. Although courts at times can take judicial notice of new legislative enactments, here, where Appellants essentially seek to clear their evidentiary default by reference to a vague statutory amendment whose actual future impact is totally unknown, no consideration should be given to the statutory change. The Supreme Court's decision should be reviewed solely on the basis of the compelling evidence in the record, including the State's evidentiary default.

1. A Capital Funding Plan Providing $9.179 Billion Is Needed to Meet Immediate Constitutional Requirements

The record clearly established that the City's school facilities required an immediate, one-time, substantial infusion of funding to raise them to a constitutionally adequate level. To determine the precise amount of that need, Plaintiffs assembled an expert Task Force, led by

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[24] Appellants miscite this statutory reference in their reference to the 2005 legislative amendment on page 86 of their brief.

[25] The only discussion in their entire brief of this allegedly major statutory change is that it "raised the building aid ratio and authorized reimbursement for the City's unique site-acquisition and development costs and multi-story construction expense." App. Br. at 86. Even if this change actually goes into effect in 2006-2007, it would appear to have a minor impact, since it appears that at most it would raise New York City's grossly inadequate reimbursement by about 3%.

Patricia Zedalis, Chief Executive of the Board of Education's Division of School Facilities from 1996 to 2001. The State's chief witness on capital facilities issues, Charles Szuberla of the State Education Department, was a member of the Task Force. After extensively analyzing the City's capital needs in the specific areas of constitutional deficiency identified by the Court of Appeals, the Task Force issued the BRICKS proposal identifying $9.179 billion in new capital funding, on top of the existing build aid reimbursements, to meet constitutional requirements. After that plan was presented in detail at the hearings below, and in the absence of any opposition or alternative plan by Appellants, the Referees and the Supreme Court accepted the BRICKS proposal and ordered a $9.179 billion five year capital funding plan.

Contrary to Appellants' baseless assertions that the Supreme Court's Order requires 100% "up-front" payments (App. Br. at 82), and that it omits "critical accountability measures [to] ensure that money is used efficiently or for the intended purpose" (*id.* at 83), the Supreme Court's Order affords Appellants ample discretion to determine how the fund will be structured, the manner in which it will be funded or amortized, and the accountability procedures that should be instituted to ensure that they money is used efficiently. For example, the State will determine whether the funds will be administered through the Dormitory Authority, the State Education Department or any other State agency, and the State will establish the controls to ensure that the funds are used for their intended purpose. Plaintiffs assume that capital expenditures will be bonded and amortized over a 30 year period, at an estimated annual cost of $641 million by the end of the five-year period at an assumed interest rate of 5%. *See* R.171. The State may, however, choose another amortization schedule or another method for financing the fund.

The Referees heard extensive testimony and considered hundreds of pages of explanatory documents concerning the BRICKS plan. They found that "[t]he BRICKS Plan offers the most

accurate estimate of the cost of providing the facilities necessary to provide the opportunity for a sound basic education in the City of New York." R.5864. As they note, using the Court of Appeals' decision as a guide, the Facilities Task Force that developed the BRICKS Plan formulated a series of itemized recommendations in five primary areas that correspond with each area of deficiency identified by the Court of Appeals and the trial court:

(1) elimination of overcrowding;

(2) class size reduction;

(3) access to specialized spaces, such as libraries, laboratories, and auditoriums;

(4) avoiding imminent additional overcrowding through preventive maintenance on facilities that are in such grave condition that they may be rendered unusable within five years; and

(5) providing computers and necessary technology upgrades.

R.174, 3372.

For each of these priority areas, the Facilities Task Force identified specific capital projects that were necessary to remedy the deficiency and estimated the cost of each project. The cost estimates are reliable, reasonable, generally conservative and based on the most accurate cost information currently available. The Referees specifically examined and affirmed the Task Force's detailed cost specifications and projections regarding construction costs, enrollment projections and class size estimates, costs of repair and maintenance and costs of technology infrastructure. R.5865-66.

In the proceedings below, Appellants did not dispute either the specific projects set forth in the BRICKS Plan or the specific cost estimates. R.5864. Indeed, their only witness with any knowledge of the city's capital needs was Mr. Szuberla, who agreed that Plaintiffs had employed a sound methodology in their capital survey and that substantial additional billions of dollars of capital spending is required. R.2124.

Nevertheless, Appellants now claim on appeal that the BRICKS plan overstates the cost of compliance with *CFE II* because (1) "plaintiffs' costs far exceed New York City's own cost projections for facilities over the next five years," and (2) "plaintiffs overstate the cost of providing additional classroom space to reduce class size" by purportedly failing to account for expected declines in enrollment. App. Br. at 88-89. Neither objection has any basis. With respect to differences between the City's estimated cost and the BRICKS plan, the City's Capital Plan and BRICKS plan are not coextensive.[26] The City's Capital Plan, which calls for $4.21 billion in expenditures to reduce class sizes and eliminate overcrowding, as referenced by Appellants (App. Br. at 88), does not include a number of items that are required under *CFE II*. Instead, this item in the City's Capital Plan relates only to adding additional capacity to reduce class sizes in grades K to 3. The BRICKS plan, by contrast, accepts the City's figures for the elimination of overcrowding and class size reduction in K through 3 and, in accordance with *CFE II*, also includes funding for reducing class sizes in grades 4 through 12. R.2390-91. To determine the costs of adding this additional capacity, the Facilities Task Force used the School Construction Authority's own cost estimates, thereby ensuring that the BRICKS plan does not overstate costs. R.3371.

Second, Appellants' claim that the BRICKS plan overstates the cost of class size reduction because it fails to account for expected declines in student population (App. Br. at 83) is simply wrong. The Facilities Task Force expressly incorporated the most up-to-date

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[26] The City's $13.1 billion five-year Capital Plan is comprehensive, but it does not purport to be an analysis of what is required to remedy the specific capital facilities deficiencies identified by the Court of Appeals. Instead, the Capital Plan identifies those needs that the Department of Education believes might be funded within the next five years, and it prioritizes funding based on considerations that include a range of factors that go beyond the specific capital funding items identified by the Court of Appeals. In addition, the Capital Plan excludes a number of projects that *are* necessary under the Court of Appeals' decision.

enrollment projections from the City that reflect this expected decline in enrollment to determine the costs of reducing class sizes to constitutionally adequate levels. R.3374. This was done specifically to ensure that the costs of adding additional capacity in the BRICKS plan were not overstated in the way that the State now claims.[27]

2. The Current Building Aid System Cannot Provide Sufficient Funding to Meet the Court of Appeals' Mandate

Although Appellants claim that the current building aid system provides open-ended funding for all locally-initiated construction projects (R3847, 4911), Mr. Szuberla's testimony, as well as that of Patricia Zedalis, made clear that the formulas operate to ensure that New York City is *not* reimbursed for a large portion of its actual costs of new construction. The record includes detailed descriptions of the technical reasons for this result. R.3382-86. Historically, New York City has been reimbursed for less than 25% of actual costs compared to reimbursement rates of up to 75% to 80% in other parts of the state. R.186-87, 2059-60, 2365, 3384.

Mr. Szuberla's testimony established that New York City's facilities deficiencies were much more critical than those of other school districts in the State ("The average age of school buildings in New York City . . . was 56.4 years [and] the average building [age] in . . . the average need/resource district . . . was about 40 years." (R.2093)); but its antiquated buildings were being replaced under the current reimbursement system at a much slower pace than buildings in districts elsewhere in the state ("rural districts were replacing schools at basically

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[27] The Supreme Court's Order includes a requirement that a new facilities study, substantially following the BRICKS methodology be undertaken in 2009 and thereafter, as necessary. R.10. Since the BRICKS plan, like all long-range plans, is predicated on a number of assumptions and projections, clearly it is necessary to undertake a follow-up facilities study to make sure that all constitutional deficiencies have, in fact, been corrected by 2009.

twice the rate New York City was." (R.2091)). Overall, Mr. Szuberla agreed that "New York City [can not] relieve its current school overcrowding problems … without … significantly more money than has been spent … in the last five years." R.2105.

If modified to eliminate the historical inequity in its treatment of New York City,[28] the state's building aid formula might possibly provide sufficient reimbursement aid to maintain the city's building stock at a steady state.[29] But equity in the future does nothing to remedy the longstanding shortfall in school construction aid to the city that has left it with overcrowded classrooms and a shortage of libraries, laboratories and auditoriums, all of which have a direct impact on pedagogy that "counts against the State in any assessment of the facilities input." (*CFE II* at 911, n.4.) As the Referees correctly found, the city's schools need an immediate major infusion of capital funds to make up for the historical shortfall in school construction in the city and to relieve the overcrowding and other capital deficiencies that the Court of Appeals identified as urgent constitutional needs. Accordingly, the Supreme Court properly ordered Appellants to implement a five-year capital funding plan to cure the immediate constitutional deficiencies.

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[28] This clear pattern of historical inequity in the workings of the building aid system justifies Plaintiffs' position that the State should fully fund the 5-year capital catch-up plan. Although Appellants misstate the position of both Plaintiffs and the Supreme Court on this point (App. Br. at 81-82), Plaintiffs recognize that despite their support for 100% state funding, under *CFE II* and the clear wording of the Supreme Court's Order, it is up to the State in "taking all steps to implement a capital funding plan" to determine whether it will fully fund the catch-up plan or whether it will compel the city to contribute part of this amount.

[29] Of course, since building aid is based on a reimbursement mechanism, the city receives funds from the state (on a 30 year amortization basis) only if it is willing and has the capacity to advance the money needed for each capital project. Therefore, the building aid approach can not guarantee the 1.1 million school children covered by this Order that the city will in fact front the money to construct or maintain adequate facilities. This is another reason why a specific, dedicated capital fund is a constitutional imperative.

C. No Evidentiary Basis Exists to Support the Additional Accountability Reforms Appellants Seek

Appellants request that this Court order an extensive array of additional accountability mandates that go far beyond the new procedures for comprehensive planning and issuance of an annual Sound Basic Education Report ordered by the Supreme Court. App. Br. at 75-77. Ironically, this demand directly contradicts Appellants' basic position on all other issues in this appeal that the Supreme Court and the Referees have recommended *too many policy reforms* and have gone beyond the mandate of *CFE II*.

Most significantly, Appellants seek the creation of a new State Office of Educational Accountability to monitor New York City's educational performance. R.956. The Governor proposed this change to the Legislature, which refused to enact it. R.1149, 1153-54. Plaintiffs opposed creating this unnecessary new layer of bureaucracy, which would compete for jurisdiction with the State Education Department and would "generate great confusion and mischief." R.2545.[30] The Referees and the Supreme Court agreed. R.5878-79; *see also* R.18.

Clearly, Appellants seek to impose on the Legislature and the Regents a reorganization of state education oversight and other accountability reforms that these other branches of state government oppose. The additional accountability measures that the trial court did adopt were ones to which the parties, the Legislature and the Regents had all agreed in a series of negotiations. R.5876.[31]

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[30] The Regents also opposed the creation of this new office on the grounds that it would create uncertainty about which agency is ultimately responsible for enforcement and accountability (R.2676-77), and the City opposed it as being inconsistent with Mayoral Control. R.2441.

[31] Although Plaintiffs believe that certain additional enhancements to the current state education accountability system and requirements for greater public engagement in the planning processes are desirable (*see* R.221-68), further negotiations among the parties

II. NO DEFERENCE IS DUE

Understanding that the Referees' findings are supported by the record, Appellants attempt to duck the issue of the appropriate standard of review and instead argue that those findings must be set aside as a matter of judicial deference to the political branches. Appellants claim that the State has made policy decisions that the courts must respect and that the State is acting in good faith to address its *CFE II* mandates, even if it has not fully complied.

Given the circumstances of this case, Appellants' call for deference cannot be taken seriously. Appellants have squandered a 13-month grace period provided by the Court of Appeals in deference to the political process. When that period expired without action, the State's political leaders admitted that they could not comply without further direction from the courts. The State is not entitled to any further deference.

In any event, there are no State actions to which any deference is due. The State has passed no laws, implemented no regulations, and adopted no policies to meet its *CFE II* mandates. The Governor's unilateral agenda, which has been emphatically rejected by the Legislature, cannot satisfy Appellants' obligations under *CFE II* to "implement" reform.

A. Having Defied a Clear Mandate of the Court of Appeals, Appellants Are Not Entitled to Any "Deference"

The Court of Appeals expected that its decision in *CFE II* would be followed by a Legislature intent on making "good laws." On this assumption, the Court deferred to the Governor and the Legislature for 13 months, recognizing that, in the first instance, the political branches were better able to redress the constitutional harm:

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and the affected government officials on additional accountability enhancements should be able to resolve these issues.

> We are, of course, mindful – as was the trial court – of the responsibility, underscored by the State, to defer to the Legislature in matters of policymaking, particularly in a matter so vital as education financing which has as well a core of local control.

100 N.Y. 2d at 925; *see also CFE Trial,* 187 Misc. 2d at 113-14 ("[T]he legislature is better positioned to work with the Governor and other governmental actors who have a role in reforming the current educational system.").

The Court of Appeals therefore eschewed "micromanag[ing] education finance" *CFE II*, 100 N.Y.2d at 925, and instead set forth three broad compliance guidelines that permitted the Governor and the Legislature extensive policy discretion in the fashioning of a specific remedy. At the same time, to avoid the potential for "sustained legislative resistance" that had occurred in New Jersey and some other states (*id.* at 932), the Court set a precise deadline for the requisite actions to be completed and remanded the case to the Supreme Court "for further proceedings in accordance with this opinion" (*id.)*, so that further judicial action could be taken promptly, if necessary.

The Governor and the Legislature have abused the deference shown by the Court and now are content to wait for the courts to tell them precisely what must be done, using the pendency of the present appeal as an excuse for avoiding their continuing responsibility to develop and implement appropriate remedial policies.

Appellants emphasize that the Governor appointed a Commission to recommend appropriate remedies to respond to the Court of Appeals' order, introduced legislation based on the Commission's recommendations, and called an extraordinary session of the Legislature to deal with this issue. They acknowledge, however, that the legislation was not enacted, and that the executive and legislative branches now find themselves at a seemingly interminable impasse on this issue. App. Br. at 19.

This stalemate unfortunately reflects a deep-rooted problem of executive/legislative gridlock that pervades New York State's government today: "The machinery of government responds ineffectively …. [and] [u]naddressed problems fester and grow more acute." Gerald Benjamin, *Reform in New York: The Budget, The Legislature, and The Governance Process,* 67 ALB. L. REV. 1021, 1025 (2004); *see also* Brief *amicus curiae* of the Brennan Center, New York University, dated August 30, 2005. Whatever the causes of this ongoing executive/legislative impasse, the reality is that a clear deadline imposed by the Court of Appeals for complying with a constitutional mandate has been breached for more than a year. Continuing deference to gross inaction by the executive and legislative branches can no longer be tolerated.

The courts, therefore, must act forcefully to compel compliance. Limiting relief at this point solely to a "declaratory judgment," as Appellants urge, is not sufficient. The political branches have been aware of the Court of Appeals' remedial guidelines for over two years and of the specific dollar figures and other recommendations of the Judicial Referees for almost ten months. None of these judicial declarations have ended the continuing executive-legislative impasse, and there is no "likelihood" (App. Br. at 46) that any new judicial declarations would have any different effect. Rather, as Prof. Benjamin forcefully stated, what New York needs today for legislative action on controversial subjects is "the requirements of an outside authority, the pendancy [sic] of a deadline, and the presence of a credible sanction for non-performance." Benjamin, *supra*, at 1058.

B. The "State" Has Taken No Action to Which Any Deference is Due

Even if the State were entitled to any deference, there has been no State action to which any deference is due. After Appellants acknowledged at the first hearing before the Referees that they had failed to comply with the Court of Appeals' Order by the deadline date (R.1558), the Referees directed both parties to submit "compliance plans." R.5837. The "compliance plan"

submitted on behalf of Appellants was, in fact, the Governor's proposed legislation that he had submitted to the Legislature during the extraordinary session, but which the Legislature had decisively rejected. (R. 937-38). Furthermore, shortly after the Governor's plan was submitted to the Referees, Sheldon Silver, the Speaker of the Assembly, wrote to the Referees and stated:

> There is presently no 'State plan,' the documents submitted by the defendant are simply restatements of the Governor's proposals…. None of these proposals contain any input from either of the legislative branches of New York State government…. Furthermore, all of the Governor's proposals in their various forms, have been repeatedly rejected by the Assembly.

Supp. R.170.

Astoundingly, Appellants ask this Court to defer to the "policy position of the State" when there clearly is no *State* policy position. In essence, in this appeal Appellants ask the judicial branch to side with the executive branch in its confrontation with the legislative branch on formulating a CFE compliance plan. Moreover, the position that Appellants' lawyers now ask the Court to endorse and impose on the Legislature calling for only $1.93 billion in operational aid fundamentally differs from the policy position calling for $4.7 billion that the Governor proposed and the Legislature rejected during the extraordinary session. This extraordinary request exposes the so-called deference argument for what it truly is: an appeal to the Court to defer to the *Governor's* policy positions and to impose them on the Legislature, thereby making them the State's policy positions.

III. THE SUPREME COURT HAD THE POWER AND DUTY TO ISSUE AN ORDER ENFORCING THE COURT OF APPEALS' ORDER

The Court of Appeals repeatedly emphasized in *CFE II* the responsibility of the judicial branch to "safeguard rights provided by the New York State Constitution, and order redress for violation of them." 100 N.Y. 2d at 925; *see also id.* at 931. The law of this case, as clearly

articulated by the Court of Appeals, is that the constitutional rights of the 1.1 million school children must be promptly redressed.

Appellants were accorded a 13-month grace period to provide redress. After that deadline passed without the enactment of any of the necessary reforms, the Supreme Court, to whom the matter was remanded for any necessary further proceedings, clearly had the authority and the responsibility to review the differing positions of the parties, to fashion a reasonable remedial plan based on the evidence provided to support those positions, and to order that an appropriate set of reforms promptly be adopted. And its decision to empanel a trio of distinguished referees and to give them the authority and the responsibility, *inter alia*, to make recommendations on how to bring the "State's school funding mechanism into constitutional compliance in so far as it affects the New York City School System" was, under the circumstances, both appropriate and necessary.[32]

A. The Supreme Court Has the Authority to Impose an Effective Remedy for a Constitutional Violation Including Actions that Require Expenditure of State Funds

In *CFE II*, the Court rejected Appellants' argument that the Court's remedial order at that time should be limited to a simple order directing "the proper parties to eliminate the deficiencies." *CFE II*, 100 N.Y.2d at 925. The Court instead required Appellants to implement actual reform of the state education finance system with the clear understanding that reform would result in increased funding for New York City. The Court expressly adopted the reasoning of the Supreme Court that "the necessary 'causal link' between the present funding

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[32] As the highest courts of Kansas, Arkansas and Wyoming have concluded, when the Governor and Legislature refuse to implement constitutional requirements, the courts are compelled to take effective compliance action or risk becoming complicit in the constitutional violation. *Montoy v. State*, 112 P.3d 923 (Kan. 2005); *Lake View Sch. Dist. No.25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (Ark. 2002); *State of Wyoming v. Campbell Co. Sch. Dist.,* 32 P.3d 325 (Wyo. 2001).

system and the poor performance of city schools could be established by a showing that increased funding can provide better teachers, facilities and instrumentalities of learning. *Id*. at 919. The Supreme Court, therefore, clearly has the power to order specific funding increases and specific finance accountability measures.

In *Klostermann v. Cuomo*, 61 N.Y.2d 525 (1984), the Court of Appeals decisively dismissed the State's claim that "fashioning any judgment would necessarily involve the allocation of resources and entangle the courts in the decision-making function of the executive and legislative branches." *Id*. at 535. The Court also rejected the State's additional argument that "there simply is not enough money to provide the services that plaintiffs assert are due them" in light of the substantial constitutional rights at issue. *Id*. at 537.

In *Klostermann*, the Court required the Governor and other state defendants to provide adequate services to individuals who had been discharged from state psychiatric hospitals. The Court held:

> [T]he '[c]ontinuing] failure to provide suitable and adequate treatment cannot be justified by lack of staff or facilities.' This defense is particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights.

61 N.Y.2d at 537 (internal citations and quotations omitted); *accord Aliessa v. Novello*, 96 N.Y.2d 418 (2001) (striking down state Medicaid provision that denied medical assistance to certain groups of immigrants); *In re Natural Res. Def. Council v. New York City Dep't of Sanitation,* 83 N.Y.2d 215 (1994) (requiring New York City Department of Sanitation to implement recycling law despite inadequate funding by the City Council); *Jiggetts v. Grinker,* 75 N.Y.2d 411 (1990) (requiring social services commissioner to establish a rent subsidy allowance reasonably related to the cost of housing in New York City); *McCain v. Koch*, 70 N.Y. 2d 109 (1987) (holding the mayor of New York City and other public officials responsible for ensuring

that homeless shelters meet sanitary standards); *see also*, *New York County Lawyer's Ass'n v. State,* 294 A.D.2d 69 (1st Dep't 2002) (ordering New York State to raise the hourly rates for court-appointed attorneys).

The clear holding in *Klostermann* is not in any way limited in its application to this case by Art. VII, § 7 of the State Constitution,[33] as Appellants suggest. App. Br at 42. Indeed, the purported relevance of Art. VII to the issues involved in the current appeal is hard to decipher. This constitutional provision was enacted in 1846 to eliminate unaccountable spending actions by the executive branch by specifying that no state disbursements could be made without an explicit legislative appropriation.[34] *See* Peter J. Galie, *The New York State Constitution: A Reference Guide* 171 (1991); *see also*, *Anderson v. Regan*, 53 N.Y.2d 356 (1981) (federal funds received by the state for specific programs cannot be expended without enactment of an appropriation bill). Article VII is concerned solely with the relative powers of the executive and legislative branches in the appropriation and expenditure of state funds. Nothing in the text of this provision and nothing in its constitutional history suggests that it was intended to limit, or even speak to, issues involving the judicial branch or questions of enforcing judicial orders.

Nor is there any basis to argue that the trial court's enforcement order is in any way inconsistent with Art. VII. Justice DeGrasse has not ordered the expenditure of any state funds without a legislative authorization. On the contrary, his Order states that "defendants shall take

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[33] Art. VII, § 7 of the New York State Constitution provides, "[n]o money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law."

[34] According to the chairman of the committee on finance in the Convention of 1846, the provision would oblige the public officers "to come forward and say what they produced, ask what appropriations they wanted, so that the legislature every year might appropriate, and the public know what they appropriated." 2 Charles Z. Lincoln, *Constitutional History of New York* 183-84 (Lawyers Co-operative Publishing Co. 1906).

all steps necessary to implement an operational funding plan that will provide the New York City School District [specified levels of operations funding and capital funding.]" R.8-9. To the extent that "all steps necessary" include new state expenditures, the Order obviously contemplates that appropriate legislative appropriations will be made. As indicated above, the courts clearly have authority to direct the Legislature to enact such appropriations, if necessary to effectuate statutory and constitutional rights.

The century-old case, *People ex rel. Broderick v. Morton*, 156 N.Y. 136 (1898), which Appellants cite for the proposition that "the courts are without jurisdiction to control the executive's actions" (App. Br. at 49), has nothing to do with the authority of the judiciary to order the political branches to take action that may require the expenditure of public funds. The issue there, phrased in archaic terms of whether a writ of mandamus may issue against the governor who is acting in "the king's" stead (*id.* at 145), was whether the Court has jurisdiction to issue a directive against the Governor personally. Phrased in modern terms, this is a justiciability issue, and whatever lingering precedent *Broderick* may have in other circumstances,[35] the Court of Appeals has definitively established the justiciability of the

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[35] It is also highly questionable whether *Broderick* retains any precedential significance. The archaic common law writs, the significance of which were at the heart of the *Broderick* controversy, were consolidated and replaced by C.P.L.R. Art. 78 in 1937. Since that time, innumerable proceedings have been brought against the Governor and no further claims have apparently been made that the Governor, standing in "the king's" stead, is above the reach of the law. *See, e.g., Pataki v. Silver*, 4 N.Y.3d 75 (2004) (challenge to Governor's authority to issue line item vetoes of legislation); *Saratoga County Chamber of Commerce v. Pataki,* 100 N.Y.2d 801 (2003) (holding unconstitutional the Governor's commitment to a Tribal State compact permitting casino gambling on Indian reservations); *Saxton v. Carey*, 44 N.Y.2d 545 (1978) (challenging validity of state budget because it was insufficiently itemized); *Rapp v. Carey,* 44 N.Y.2d 157 (1978) (challenging Governor's executive order requiring civil service employees to file detailed financial disclosure statements); *Mulroy v. Carey*, 43 N.Y.2d 819 (1977) (challenging Governor's order that New York's Attorney General investigate allegations involving the purchase of office and public employee positions).

constitutional issues in the present case. *See Campaign for Fiscal Equity v. State of New York,* 86 N.Y.2d 307 (1995) ("*CFE I*"); *see also Bd. of Educ. Levittown Union Free Sch. Dist. v. Nyquist,* 57 N.Y.2d 27 (1982). Moreover, since the Court of Appeals in this case has already issued a clear remedial directive to the governor and the other defendants, the only question before this court is whether that directive will be honored. Neither *Broderick* nor any other case provides any authority whatsoever for Appellants' radical position that the courts may not enforce their own orders, once those orders have been issued.

Moreover, at this point, the extent to which – or even if – the Supreme Court's Order will require new or increased legislative appropriations remains unclear. Pursuant to the Court of Appeals' recent decision in *Pataki v. Silver*, 4 N.Y.3d 75 (2004), the Governor has sole responsibility for developing the State's budget and originating the appropriations bills that enact the budget. The Legislature may then either reduce or delete the Governor's appropriations or refuse to act on the Governor's proposed budget pending negotiations. The Supreme Court's Order "to take all steps necessary" to provide sufficient funding for the New York City schools must be deemed. Then, at least in the first instance, to be directed to the Governor (*see id.*), requiring him to include a level of state funding necessary to comply with the order in his Executive Budget proposal. The extent to which the additional funds that are constitutionally required must come from the state or from the city, or whether any additional state funds that may be necessary should be derived from shifts in existing appropriations or from new appropriations are policy decisions to be made, at least in the first instance, by the Governor in formulating his appropriation bill.

B. Proper Separation of Powers Concerns and the Integrity of the Rule of Law Require Effective Enforcement of *CFE II*

Appellants' separation of powers arguments ignore the important and necessary role of the judicial branch in exercising the powers of judicial review. Judicial review has two necessary components – interpreting the constitution and laws and enforcing remedies for rights established under them.

> When the law immunizes official violations of substantive rules because the cost or bother of doing otherwise is too great, thereby leaving victims without any realistic remedy, the integrity of the rules and their underlying public values are called into serious question.

Brown v. State of New York, 89 N.Y.2d 172, 195 (1996). America's democracy has survived and the process of judicial review has thrived over the past two hundred years because the executive and legislative branches at both the federal and state levels have consistently understood the importance of respecting the final judgments and orders of the highest courts.

New York State, even more than other states, relies on the good faith implementation of court orders that vindicate citizens' rights. For example, New York law disfavors class actions in cases involving state defendants: our law presumes that once a right is clarified in regard to one citizen, the government actors will apply the law to all similar cases. *See, e.g.*, *Legal Aid Soc'y v. New York City Police Dep't,* 274 A.D.2d 207, 213 (1st Dep't 2000); *Martin v. Lavine,* 39 N.Y.2d 72, 75 (1976).

The continuing, irresponsible defiance of a clear constitutional mandate of New York State's highest court – a pattern of defiance that is unprecedented in the history of New York State and that far exceeds patterns of partial compliance that have occurred with similar education funding cases in other states – insults the entire fabric of judicial review and of the rule of law.

Appellants' blatant non-compliance, extending now over more than a year, has been broadly and widely publicized because of the high stakes involved. Over one million New York City school children expected that the relief promised by their state's highest court would begin to flow on the timeline that the Court of Appeals had announced. It has not. Instead, repeatedly during the past year, the children, their parents (and the public at large) have read in their newspapers and seen on their television screens, contemptuous statements and actions by the highest governmental leaders in the state, and their refusal to act in accordance with the direct order of the state's highest court. Disrespect for the rule of law by high government officials places at risk the whole system of good faith, voluntary compliance with legal obligations upon which our entire democratic system relies.

California's Supreme Court, faced with an analogous (but less egregious) problem of a legislative refusal to authorize payment of attorneys' fees that had been ordered eight years earlier, well summarized the stakes for society when state officials defy the rulings of the courts:

> [I]ndividual citizens who litigate claims against the government in our state courts are constitutionally entitled to expect that when the government loses, the Legislature will respect the final outcome of such litigation. The Legislature is not a super court that can pick and choose on a case-by-case basis which final judgments it will pay and which it will reject. If that kind of arbitrary conduct by the Legislature were to be the law, our system of justice would be subordinated to the popular vote of legislators, and our constitutional bed-rock principle of separation of powers would become a shattered mass of scattered fragments.

Mandel v. Myers, 629 P.2d 935, 948 (Cal. 1981).

C. The Federal Courts and Courts in Other States Have Consistently Upheld Enforcement Orders in Similar Cases.

Given the unprecedented nature of this case, the Referees, after stating that "New York courts have broad discretion to fashion equitable remedies, N.Y. Const. Art VI § 7, subd. a; N.Y.C.P.L.R. § 3017(a); *Kaminsky v. Kahn*, 23 A.D. 2d 231, 237 (1st Dept 1965)" (R.5879),

appropriately looked to precedents from federal courts and from courts in other states that had confronted official resistance to court decrees.

The major federal precedents, of course, involved the sustained patterns of resistance to the U.S. Supreme Court's school desegregation mandate in *Brown v. Bd. of Educ. of Topeka,* 349 U.S. 294 (1955). The Referees (R.5879-80) cited a number of these cases as examples of the enforcement actions that the federal courts had taken to uphold the integrity of the judicial process and to ensure that the school children's constitutional rights were vindicated. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ*., 402 U.S. 1, 15 (1971) (ordering a school district to implement a far-reaching court-designed desegregation plan); *Milliken v. Bradley*, 433 U.S. 267, 280-283 (1977) (ordering the state to pay one-half of the additional costs of education programs to assist children who had been subjected to racial discrimination); *Arthur v. Nyquist*, 712 F.2d 809 (2d Cir. 1983) (ordering the Buffalo City council to appropriate an additional $7.4 million to its school district); *see also, e.g., Missouri v. Jenkins*, 495 U.S. 33 (1990) (holding that a district court could order the school district to raise property taxes, although the court could not set the tax levy rate itself); *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir. 1984) (*en banc*) (affirming district court order requiring the State of Missouri*, inter alia,* to pay the full cost of student transfers between the city and suburban school districts and one-half of certain "quality education" programs).

Appellants attempt to minimize the significance of these key precedents by arguing that they deal with the "hierarchical relationship between the federal and state governments embodied in the Supremacy Clause." App. Br. at 48-49. Although a federalism dimension obviously exists implicitly in all federal cases involving state and local defendants, the critical issue in the desegregation cases was how to uphold the integrity of the judicial process when governmental

defendants refuse to comply with clear court directives. This question applies equally to both federal and state courts when their authority is flouted. The federal courts' extensive experience with this problem is of immense significance to courts in New York State, which (fortunately) have little experience in dealing with blatant failures of state officials to respect court rulings. For example, the U.S Supreme Court's insistence that the Little Rock, Arkansas school desegregation order be enforced without delay, despite the public hostility "engendered largely by the official attitudes of … Governor [Faubus] and the Legislature," *Cooper v. Aaron*, 358 U.S. 1, 12 (1958), is highly relevant to this Court's consideration of the delays sought by defendants in the present case that prevent the vindication of the constitutional rights of more than one million school children.

In contrast to their dismissal of the relevance of the federal precedents, Appellants acknowledge the relevance of the decisions of state courts in school funding cases.[36] However, they grossly distort the holdings in the state court decisions that they do cite, and they omit any reference to the major state court decisions that are directly on point.

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[36] Appellants cite instances where state officials did not fully or promptly comply with court orders regarding school funding issues. Most states have complied promptly with court orders in these cases. For example, after the Kentucky Supreme Court struck down its education statutes as unconstitutional, in *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186 (Ky. 1989), the state legislature promptly enacted sweeping changes in finance and accountability. Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARVARD J. ON LEGIS. 2 (Summer 1991). In Vermont, only four months after the Vermont Supreme Court declared the state's education finance system unconstitutional, in *Brigham v. State*, 692 A.2d 384 (Vt. 1997), the legislature enacted a new school funding law that replaced local property taxes with a uniform, statewide property tax and established a per pupil block grant for every district. Erin E. Buzuvis, *Note: "A" For Effort: Evaluating Recent State Education Reform In Response To Judicial Demands For Equity And Adequacy*, 86 CORNELL L. REV. 644, 676 (March 2001); *see also* Vermont Department of Education description *available at* www.state.vt.us/educ/new/html/laws/act60.html.

Appellants' invocation of the school funding litigation in Massachusetts to support their cause is bizarre. App. Br. at 51-52. In stark contrast to the actions of Governor Pataki and the New York State Legislature, defendants in Massachusetts took dramatic steps to comply with the court order that held its state education finance system to be unconstitutional. *McDuffy v. Secretary*, 615 N.E.2d 516 (Mass. 1993). Even a few days before the *McDuffy* court issued its decision, the Massachusetts legislature passed the Education Reform Act of 1993, Massachusetts General Laws, Chapters 69-71 ("ERA"). *See Hancock v. Comm'r*, 822 N.E.2d 1134, 1137-38 (Mass. 2005). Based in large part on an independent costing-out study, ERA complied with the *McDuffy* order and "radically restructured the funding of public education across the Commonwealth based on uniform criteria of need, and dramatically increased the Commonwealth's mandatory financial assistance to public schools." *Id*. at 1138.

In its 2005 *Hancock* school funding decision, the Massachusetts high court reviewed the state's responses to *McDuffy* "to place the present controversy in its proper context." *Id.* at 1140. The court found that the *McDuffy* defendants, by implementing ERA, had "eliminated the central problem of public school funding that we identified as unconstitutional in *McDuffy*." *Id*. at 1141. Based on the state's adoption of extensive and largely effective reforms in response to *McDuffy*, the *Hancock* Court reaffirmed *McDuffy* but denied plaintiffs' motion for further relief "at this time." *Id.* at 1137-41.

Appellants' reference to the North Carolina school funding case, *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365 (2004), also ignores the critical distinction that in North Carolina, as in Massachusetts, defendants began acting to remedy the constitutional violation immediately after the trial court's decision and have continued to allocate increasing amounts of state funding to their low-wealth, high-need districts since the North Carolina Supreme Court's decision in

July 2004.[37] The quotes reflecting judicial restraint on page 53 of Appellants' brief mirror the similar concerns to avoid micro-managing of educational policies that were expressed by the New York Court of Appeals in *CFE II*, and they have no relevance to the need for a more directive judicial stance when, as in New York, the defendants have refused to implement the original remedial order.[38]

The most relevant of all the state court decisions is *Montoy v. State*, 112 P.3d 923 (Kan. 2005), a case with a legal trajectory that is remarkably similar to the present case – and one that the Appellants glaringly fail to mention in their brief. After invalidating Kansas' state education finance system because it failed to meet the constitutional requirement to make "suitable provision for finance of the public school system" under Article 6, Section 1 of the state

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[37] Even though North Carolina appealed the lower court decision leading to the Supreme Court's 2004 ruling in *Hoke*, state officials there immediately began planning for ways to provide more support to low wealth districts as ordered by the court pending the appeal, Kathleen Manzo, *N.C. High Court Rules State Must Spend More on Schools*, 23 ED. WEEK, 2004 WLNR 11667718. Aug. 11, 2004, at 23, and, as significantly, did not seek a stay pending the appeal, the Governor stating that "I do not want to see this litigation dragged out for several more years. That would create much uncertainty and hamper our efforts for greater educational progress." Tim Simmons, *State to Seek Schools Ruling*, THE NEWS AND OBSERVER, May 3, 2002, at A1.

[38] Appellants also cite *Idaho Sch. for Equal Educ. Opportunity v. State*, 97 P.3d 453 (Idaho 2004), and *Butt v. State*, 842 P.2d 1240 (Cal. 1992), in regard to alleged general differences in the remedial powers of state and federal courts. App. Br. at 49. They fail to note, however, that on the specific issues that are relevant to the current appeal, these cases strongly support Plaintiffs' position. Thus, the Idaho Supreme Court noted with approval that "when the Legislature . . . had failed to take appropriate action, the district court began implementing its remedial measures, including a phase of information gathering and the appointment of a special master" (*Idaho*, 97 P. 3d at 456), and it held that although the courts may not themselves directly impose a tax, they may "direct a governmental entity to carry out its legislatively assigned duty to tax." *Id.* at 464. Similarly, the California court upheld the "equitable authority" of the trial court to enforce students' fundamental constitutional right to an education by directing the State Superintendent of Public Instruction to take over a school district which had defaulted on its financial responsibilities and by authorizing the State Controller to provide the district an emergency loan. *Butt*, 842 P.2d at 1258-59.

Constitution, the Kansas Supreme Court directed the legislature to enact appropriate remedial legislation within six months. *Id.* at 926. Although the Kansas legislature did enact remedial legislation by the deadline date, the Court held that the funding increase it had provided for the coming school year fell far short of the amount needed to provide a "suitable education" as determined by the state's own costing out study. The Court therefore gave the legislature another month to appropriate a specific $285 million increase for the next school year. *Id.* at 940-41.[39] After the legislature failed to enact the requisite legislation by the new deadline date, despite extensive efforts in a special session and the urging of the governor, the court set the matter down for an immediate hearing; on the eve of the hearing, legislation was finally enacted that provided the full increase called for in the court's order. *See* Fred Mann, *Court Allows Schools to Open*, Wichita Eagle, July 9, 2005.

In the course of its several *Montoy* decisions, the Kansas Supreme Court firmly and explicitly rejected the very same separation of powers arguments that have been advanced by the state defendants in this appeal:

> Nor should doubts about the court's equitable power to spur legislative action or to reject deficient legislation impede judicious over-sight. An active judicial role in monitoring remedy formulation is well-rooted in the courts' equitable powers. As long as such power is exercised only after legislative noncompliance, it is entirely appropriate.

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[39] The increase in educational spending ordered by the Court in *Montoy* represented about 7% of the State's total 2003-2004 education budget of $4,094 million. *See* Kansas State Department of Education report, Expenditures Per Pupil for Kansas Public Schools, State Totals *available at* http://www.ksde.org/leaf/reports_and_publications/expenditures_expenditures_per_pupil/5yr_expend2000-2005statetotals.pdf. A comparable 7% increase in New York State's total education spending would amount to about $2.1 billion – an amount substantially in excess of the $1.4 billion first year phase-in ordered by Justice DeGrasse in this case.

Montoy, 112 P.3d at 931 (internal citation omitted). Quoting extensively from *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (2002), in which the Arkansas Supreme Court had reviewed and rejected as unconstitutional the state's school financing scheme, the *Montoy* court further stated that "indeed [it is our] duty, to engage in judicial review and, when necessary, compel the legislative and executive branches to conform their actions to that which the constitution requires."[40] *Id.* at 930; *see also State v. Campbell County Sch. Dist.*, 32 P.3d 325, 332 (Wyo. 2001) ("The legislature's failure to create a timely remedy consistent with constitutional standards justifies the use of provisional remedies or other equitable powers intended to spur action.").

In sum, virtually all of the state courts that dealt with non-compliance with their school funding decrees – none of which faced the total failure by the executive and legislative branches to take any compliance action whatsoever as has been the experience in New York – have taken forceful steps to uphold the integrity of the judicial process and to ensure that their orders would be promptly obeyed. The motivations behind this consistent pattern of prompt action to uphold the rule of law were well-summarized by Justice Tom Glaze, who, just a few months ago, in concurring with the decision of the Arkansas Supreme Court to authorize two special masters to examine and evaluate the issues relevant to allegations of non-compliance with the Court's prior school funding decree, wrote:

> When, as here, we have taken upon ourselves the daunting task of ensuring compliance with out constitutional mandate for a

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[40] Significantly, the Kansas Constitution contains an appropriations clause similar to that of New York's: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." Kan. Const. art. 2, § 24. The Kansas Court implicitly recognized that such a provision did not impede the Court's enforcement of its constitutional obligation to ensure that the Governor and Legislature fulfilled the substantive requirements of the education clause by ordering the Legislature to double the funding provided for the schools for the coming school year.

> 'general, suitable, and efficient system of free public school,' *see Ark. Const. art. 14,§ 1,* we should not shrug off that extraordinary calling because we are suddenly afraid of how our actions might be perceived or for some unfounded 'separation of powers' concerns. In sum, if this court does not take all necessary steps to ensure that the General Assembly had complied with the clear terms of our *Lake View* ruling, who will? No one else has done so for twenty-two years, and it is incumbent that we do so now!

Lake View Sch. Dist. No. 25 v. Huckabee, No. 01-836, 2005 WL 1358305 (Ark. June 9, 2005) (Glaze, J, concurring).

IV. THE COURT SHOULD DECIDE THIS MATTER ON A HIGHLY EXPEDITED SCHEDULE

This case is being argued more than a year after the final compliance date established by the Court of Appeals. Over a million school children, therefore, have lost a full year of vital educational benefits because of Appellants' non-compliance. In order to avoid the possibility of these children suffering irreparable injuries for yet another year, Respondents respectfully request that the Court decide this matter before the Governor formulates his Executive Budget and the Legislature convenes in January 2006.[41]

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[41] A decisive order from this Court may lead to prompt legislative action during the 2006 legislative session. If a further appeal is taken to the Court of Appeals, an early decision by this Court will allow for a final expedited determination by the Court of Appeals by the spring of 2006, in time to assure a legislative response before the beginning of the September 2006 school term.

CONCLUSION

For all the aforesaid reasons, this Court should expeditiously affirm the Order of the Supreme Court and provide that all actions required to be taken within 90 days of the date of the entry of that order shall be taken within 90 days of the date of the Court's decision.

Dated: New York, New York
September 7, 2005

Respectfully submitted,

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