To Be Argued By:
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30 Minutes Requested

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Court of Appeals
of the
State of New York

CAMPAIGN FOR FISCAL EQUITY, INC., AMINISHA BLACK, KUZALIAWA BLACK, INNOCENCIA BERGES-TAVERAS, BIENVENNIDO TAVERAS, TANIA TAVERAS, JOANNE DEJESUS, ERYCKA DEJESUS, ROBERT JACKSON, SUMAYA JACKSON, ASMANHAN JACKSON, HEATHER LEWIS, ALINA LEWIS, SHAYNA LEWIS, JOSHUA LEWIS, LILLIAN PAIGE, SHERRON PAIGE, COURTNEY PAIGE, VERNICE STEVENS, RICHARD WASHINGTON, MARIA VEGA, JIMMY VEGA, DOROTHY YOUNG, and BLAKE YOUNG,

Appellants-Respondents,

-against-

THE STATE OF NEW YORK, GEORGE E. PATAKI, as Governor of the State of New York, and ANDREW S. ERISTOFF, as Tax Commissioner of the State of New York,

Respondents-Appellants.

APPELLANTS-RESPONDENTS' BRIEF IN FURTHER SUPPORT OF THEIR APPEAL AND IN OPPOSITION TO RESPONDENTS-APPELLANTS' CROSS-APPEAL

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Plaintiffs respectfully submit this Memorandum of Law in further support of their appeal and in opposition to Defendants' cross-appeal.

PRELIMINARY STATEMENT

During the long course of this litigation, Defendants have continually denied and resisted the judiciary's authority to address the constitutional deficiencies that have deprived New York City children of a sound basic education. For years, Defendants claimed that there were no deficiencies and that even if there were, the courts could not compel the political branches to provide a cure. Now, on this appeal, Defendants finally acknowledge what every responsible State and City official has said outside of the courtroom for decades: The New York City schools need billions of dollars in additional funds to provide a constitutionally adequate education. And Defendants finally acknowledge that this Court must tell the Governor and the Legislature exactly how many billions must be spent to provide a constitutionally adequate education in the New York City schools.

Defendants admit that the political branches cannot answer this question on their own and that this failure has prevented the State from fully complying with the mandates of *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003) ("*CFE II*"). But while acknowledging the need for the Court's direction on the one hand, Defendants cannot fully abandon their long resistance to judicial authority; instead, they once again seek to preclude the courts from actually *requiring* the

political branches to cure the constitutional harm. And they cannot fully abandon their willingness to sponsor litigation arguments that cannot be reconciled with the actual actions and policies of the State's officials.

It is a disheartening approach that we have encountered at every turn in this thirteen-year litigation. Intent on securing judicial deference on all matters of education policy and finance, Defendants have repeatedly asserted claims in this litigation that (1) no elected or appointed official has ever embraced outside of the courtroom, (2) contradict the official education policies of the Board of Regents and the Legislature and (3) deny the findings, reports and data prepared by the State's elected and appointed officials.

For years, Defendants denied the gross inadequacies that were apparent to every reasonable observer of the New York City public school system over the last two decades. Defendants also attempted to excuse massive education failure by claiming that:

- The 40 percent high school drop-out rate in New York City should be ignored because students in this State are only entitled to an eighth-grade education;
- The City's large numbers of at-risk students, who are mostly poor and minority, are doomed by their "socioeconomic conditions" to academic underachievement; and
- Money doesn't matter, because, according to Defendants' experts, reducing class sizes, improving the quality of the teaching force and providing students with functioning science laboratories, adequate libraries and appropriate curricula will have no effect on student achievement.

The Court, not surprisingly, rejected each of these propositions, based on the extensive record at trial. Yet Defendants on this appeal once again deny and resist the Court's authority by sponsoring arguments that rest on the willful disregard of fact and the Court's prior rulings. Defendants begin their brief by actually denying that the Court ordered the State to do anything at all in *CFE II*. Rather, say Defendants, the Court merely "suggested" that the State cure the glaring constitutional failings identified by the Court. Brief for Defendants-Respondents-Cross-Appellants ("Def. Br.") at 6.

This mischaracterization of the Court's direction in *CFE II* is symptomatic of Defendants' approach to the factual record as well. At the heart of Defendants' appeal is their claim that the State satisfied the Court's command in *CFE II* to determine the actual cost of providing a sound basic education through a process that resulted in the conclusion that an additional $1.93 billion in operating funds is sufficient. As all nine judges and referees agreed below, this claim is false. And it is so obviously false that the judges below properly refused to dignify the claim with any extended consideration.

Because the $1.93 billion figure was not the subject of any factual disagreement between the lower courts, this Court cannot review Defendants' claims regarding this figure. But even if this issue could properly be brought to the Court's attention, there is no basis in the record to overturn the unanimous view of

nine judges and referees that the $1.93 billion figure does not represent any legitimate determination by the State as to the actual cost of providing a sound basic education in New York City.

Indeed, it is inexplicable that Defendants would even pretend that the $1.93 billion figure has been embraced by the "State" in light of their admission that further direction from the Court is required in order to "dispel the uncertainty among elected leaders" regarding the cost of providing a sound basic education. Def. Br. at 66. Defendants were even more emphatic below, asserting that the political branches are "badly divided" and that the judiciary must therefore determine "[h]ow much in the way of additional funds must be spent on education by the New York City school district." Brief for Defendants-Appellants to the Appellate Division ("Def. App. Div. Br.") at 43.

Since the political branches failed to answer this question on their own, the judiciary was left to fill the constitutional vacuum by relying, as it must, on the record evidence. The record evidence in this case showed that there had been no agreement among the principal State actors as to the cost of providing a sound basic education in New York City and that there had been no reform of the State education finance system to ensure, as this Court required, that every New York City school have adequate resources. Following the direction of the Supreme

Court, the Referees therefore properly took evidence regarding the cost of providing a sound basic education. This evidence showed that:

- The Governor had submitted a plan to the Legislature in the summer of 2004 calling for an increase of $4.7 billion in operating funds. Defendants then submitted this same plan, calling for the same $4.7 billion increase, to the Referees.
- The State Assembly adopted a plan that provided for a $6 billion increase in operating aid.
- The Board of Regents submitted a compliance plan to the Referees providing for an increase of $4.7 billion in operating funds.
- The New York City Department of Education submitted a compliance plan to the Referees providing for an increase of $5.3 billion in operating funds.
- The Plaintiffs submitted a compliance plan to the Referees based on a comprehensive study conducted by education finance experts, including the State's own trial experts, which called for a $5.63 billion increase in operating funds.

Defendants suggest that the lower courts improperly considered all of these plans because the Governor's plan included a methodology to which some deference is due and the application of that methodology proves that only $1.93 billion is required to provide a sound basic education. Def. Br. at 46. In fact, the "methodological choices" that Defendants champion now are nothing more than arguments crafted for litigation after the Court's June 2004 compliance deadline expired.

While we devote numerous pages in Part I of our brief to this issue, it is an unfortunate distraction. As the record makes clear, and as the judges and referees

below all agreed, no deference is due to the $1.93 billion figure, which is not based on any "State" determination of the actual cost of providing a sound basic education in New York City. To the contrary, every serious answer to this question provided by the Governor, the Legislature, the Board of Regents, the New York City Department of Education and outside experts concluded that at least $4.7 billion more must be spent to provide a sound basic education in New York City.

The critical issue before the Court, therefore, is not whether the Appellate Division identified the correct range, because the record makes clear that it did so. Rather, the critical issue now is what this Court can and should do to ensure that the Governor and the Legislature meet their constitutional responsibility to provide adequate resources to the New York City school system.

Defendants once again claim that all the Court can do is issue an advisory opinion and that it must then retreat to let the political branches do whatever they will. Defendants say that such deference is due as a matter of constitutional principle and because the State has made progress in addressing the constitutional inadequacies in the New York City public school system. They say this even though this Court in *CFE II* expressly rejected Defendants' attempt to limit its authority to "simply direct[ing] the proper parties to eliminate the deficiencies." 100 N.Y.2d at 925.

As to the Court's constitutional authority, Defendants confuse the Court's authority to order the State to take action requiring the expenditure of money with the legislative power to actually appropriate funds. We have never asked this Court to appropriate funds or to order the expenditure of funds that have not been appropriated. What we have asked the Court to do, and what it clearly has the authority and responsibility to do, is to order the State to ensure that the New York City public school system has sufficient funds to provide a sound basic education in all of its schools.

The additional cost of providing a sound basic education has now been fixed by the judiciary in the face of political default at somewhere between $4.7 billion and $5.6 billion above 2004-2005 expenditures. The Court should therefore issue an order directing that the State ensure that this increase is provided to the New York City schools over four years from whatever sources the Governor and the Legislature determine. The Court will have then fulfilled its constitutional duty, and it will be left to the Governor and the Legislature to fulfill their duty and comply with the Court's order. As the Court explained in *CFE II*, the Governor and the Legislature should be expected to respond to the Court's order by "desiring to enact good laws." *Id.* at 930.

We recognize, of course, that the Court may be concerned about the magnitude of the remedy that we seek. Indeed, throughout this litigation,

Defendants have repeatedly backed their demands for judicial deference by pointing to the "extraordinary" or "unprecedented" amount of money required to remedy the constitutional deficiencies in the New York City school system. And now that the bill finally has been calculated, Defendants warn the Court against issuing an order that would require the expenditure of "billions of dollars a year for years to come." Def. Br. at 3. Defendants assert, in essence, that the $4.7 billion to $5.63 billion price tag for curing the constitutional harm is simply too high for the Court to demand compliance.

In repeating this tired litany, however, Defendants ignore the critical fact that the $4.7 billion to $5.63 billion range identified by the Appellate Division is not a judicial creation. This range reflects the estimates and proposals submitted in the proceedings below by State and City officials, as well as outside experts, who were specifically charged with determining the cost of providing a sound basic education in New York City. These estimates and proposals reflect a clear consensus on the need for additional "billions of dollars" for the New York City schools. No one in the political branches should be surprised by the Appellate Division range, particularly since the Governor himself asked the Legislature in 2004 to approve a plan calling for a $4.7 billion increase in funding.

The Governor's legislative proposal was particularly significant in light of Defendants' long effort to convince the courts that no additional money was

needed to cure the constitutional deficiencies in New York City's public schools. Of course, there has been a disconnect between Defendants' litigation claims and the actual public positions and policies of State officials throughout this litigation. The Governor's $4.7 billion proposal, offered as a direct response to *CFE II*, should have been the end of this disconnect. And if there were any remaining doubt, the remedial proceedings before the Referees, where State officials submitted plans calling for similarly large amounts of additional funding, should have finally caused Defendants to reconcile their litigation strategy with the public record.

For what the process initiated by the Court in *CFE II* has shown is that the elected and appointed officials responsible for financing and providing a sound basic education in New York City have determined that billions of additional dollars are needed. And they made that determination even after considering the governance changes and aid increases of recent years. The Court need not hesitate, therefore, to require the State to complete the process begun in *CFE II* and to provide the necessary funds. The magnitude of the need was determined by officials and experts, not judges, and an order requiring that the need be met is constitutionally proper and necessary.

Moreover, the prospect that the courts would set the amount necessary to provide a sound basic education has been known to the Legislature and the

Governor for many years. Three years ago, this Court gave the political branches a deadline to do this work on their own. When the political branches failed to do so, the issue was forced into the courts, requiring judges and referees to make determinations that should ordinarily be left to the political branches. Defendants cannot complain, therefore, that the courts are now addressing this issue.

The fact that the State has made some progress toward "meet[ing] [its] obligations to New York City students" is not a reason, as Defendants argue, for the Court to stay its hand, but instead evidences that the political branches are quite capable of satisfying the Court's mandate. *Id.* at 2. The Legislature and Governor have found the means to fund a multibillion-dollar capital construction plan, to institute governance reform and to provide some increase in operating funds. There is no reason to conclude that the political branches cannot *fully* meet their constitutional responsibility by complying with a court order to implement changes to the State education finance system and ensure that sufficient funds are available to provide a sound basic education within a reasonable period of time.

Finally, we have never claimed that this case is simply about requiring the political branches to deliver a specific amount of money to the New York City school district. We have been forced by the State's default to have the courts determine the cost of providing a sound basic education, and the remedial proceedings necessarily focused on providing a specific answer to that question. If

the State were to act responsibly and address the continued shortfall in operating funding for the New York City public school system in a serious way, implementation of the related governance and accountability processes would be fully determined by Defendants, and not by the courts.

But so far, the political branches have been unwilling or unable to take the action necessary to comply with *CFE II*. They have been content to let the constitutional failings persist and to invite the courts' solution. By their own inaction, the political branches have therefore passed the question of "how much" to the courts. The Court should now end this litigation by answering the "how much" question in an order that firmly and finally calls the Legislature and the Governor to their constitutional duty.

ARGUMENT

I. THERE IS NO DISPUTE FOR THIS COURT TO RESOLVE CONCERNING THE COST OF PROVIDING A SOUND BASIC EDUCATION, AND EVEN IF THERE WERE, THERE IS NO BASIS TO OVERTURN THE LOWER COURTS' FINDINGS

The question of how much money is necessary to provide a sound basic education in the New York City schools is a question of fact. With respect to operating aid, all of the judges and referees in the proceedings below agreed that an increase of at least $4.7 billion is necessary. With respect to capital costs, all of the judges and referees agreed that the State must ensure that the City can fund $9.179 billion in capital improvements. There is no legal basis, therefore, for this Court to

disturb the Appellate Division's finding that an increase in operating funds in the range of $4.7 billion to $5.63 billion and the provision of $9.179 billion in capital funds are necessary to provide a sound basic education in New York City.

Defendants' attempt to reopen this factual question by asserting that the Appellate Division essentially made a calculation error with respect to operating funds is baseless. It is a claim built on a distorted view of what various State actors did in response to the Court's decision in *CFE II* and what happened in the remedial proceedings that followed the State's inaction. Nor is there any basis for the Court to review the lower courts' unanimous findings regarding capital expenditures; Defendants defaulted on this issue in the remedial proceedings and now cannot dispute the findings below.

Moreover, even if there were any basis for the Court to reconsider the question of the actual cost of providing a sound basic education in New York City, the record fully supports the Appellate Division's ultimate conclusions. Defendants' continued assertion that the courts must defer to the purported determination by the "State" that only an additional $1.93 billion in operating aid is necessary to provide a sound basic education is inexplicable. No such determination was ever made, as Defendants ultimately admit, and the $1.93 billion figure was seized upon by Defendants solely as part of a cynical and

misleading litigation strategy intended to further Defendants' demand for judicial deference after the Court's July 2004 deadline expired.

A. The Lower Courts Agreed That At Least $4.7 Billion in Additional Operating Aid and At Least $9.179 Billion in Capital Spending Are Necessary To Provide a Sound Basic Education, and There Is No Issue of Fact Properly Before This Court Concerning Either Amount

We described in our opening brief the sequence of events following *CFE II*, and we limit our discussion here to summarizing a few key facts showing that there is no factual dispute for the Court to resolve regarding the cost of providing a sound basic education in the New York City schools. The key foundational fact is that, as the parties agree and the lower courts found, the State failed to meet the July 2004 deadline set by the Court to "*implement* the necessary measures" to ensure that the New York City public school system provides a sound basic education. *CFE II*, 100 N.Y.2d at 930 (emphasis added).

This failure led to the remedial proceedings convened by the Supreme Court at which Defendants admitted the State's failure to comply with the July 2004 deadline. Appellants-Respondents' Record on Appeal ("R.") at 1423. In the face of this failure, the Referees appointed by the Supreme Court invited the parties, as well as the City Department of Education and the Board of Regents, to submit compliance plans. R.5836-40. As described in our opening brief, the various compliance plans, as well as the Assembly's proposal (which was also accepted

into the record), called for increases in operating funds ranging from $4.7 billion to $6 billion. *See* Appellants-Respondents' Opening Brief ("Opening Br.") at 17-18. No plan submitted to the Referees called for less than $4.7 billion in increased operating funds.

On the basis of this common recognition of the need for additional billions of dollars in operating funds, and recognizing that determining the cost of providing a sound basic education in the New York City schools is a complex task, we suggested at the outset of the proceedings that the Referees could avoid a prolonged fact hearing by setting a constitutional range reflecting the various compliance proposals.

The Referees instead undertook a comprehensive fact-finding and ultimately answered the question of how much money is required to provide a sound basic education by determining a specific sum, $5.63 billion. R.5858. This determination, as described in our opening brief, rested in part on the application of the "successful schools" methodology advocated by Defendants and is fully supported by the record. *See* Opening Br. at 21; R.5854. The Referees noted, however, that their determination was also supported by the range of estimates submitted to them. R.5845. The Supreme Court accepted the Referees' findings. R.7-11.

With respect to capital funding, Defendants initially claimed that *CFE II* did not require the State to ensure any improvement in facilities and then claimed that the State's capital funding structure provided a mechanism to meet any legitimate capital needs. Defendants failed to submit any evidence to the Referees concerning facilities needs or to otherwise challenge Plaintiffs' extensive evidence concerning those needs and the costs of meeting them. R.5864. Not surprisingly, the Referees adopted the Building Requires Immediate Capital for Kids ("BRICKS") plan submitted by the Plaintiffs. R.5867.

When these issues came before the Appellate Division, the majority agreed that Defendants had offered no evidence to counter the BRICKS plan and affirmed the Supreme Court's findings regarding the need for $9.179 billion to fund the BRICKS plan. Supp. R.27. There is no factual dispute between the Supreme Court and the Appellate Division majority regarding the BRICKS plan.

With respect to operating aid, the Appellate Division majority determined that the proposal submitted by the Governor, calling for an increase of $4.7 billion, was entitled to some deference, and that since there was also support in the record for the Referees' determinations, the constitutionally permissible range should be set at $4.7 billion to $5.63 billion. Supp. R.16, 26.

On this appeal, the relevant fact about the Appellate Division and the Supreme Court decisions is that both *agreed* that no less than $4.7 billion in

additional operating aid is necessary to provide a sound basic education. Not one of the nine judges and referees said that any lesser amount would satisfy the State's constitutional obligation.

The Court, therefore, cannot review Defendants' claim that $1.93 billion is constitutionally sufficient. In fact, since neither of the parties is asking the Court to resolve the difference between the Appellate Division and the Referees, there is no basis for the Court to make any new findings regarding the cost of providing a sound basic education in New York City.

This limitation on the Court's review is set forth in the Judiciary Article of the New York State Constitution, which permits the Court of Appeals to review facts in a civil case only where the Appellate Division, "on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered." N.Y. Const. art. VI, § 3(a); *see also* N.Y. C.P.L.R. 5501(b) (McKinney 2006). Accordingly, where there are "affirmed findings of fact supported by the record . . . this Court cannot review those facts and substitute its own findings." *Glenbriar Co. v. Lipsman*, 5 N.Y.3d 388, 392 (2005); *see also Soto v. New York City Transit Auth.*, 6 N.Y.3d 487, 493 (2006) ("[A]n affirmed finding of fact with support in the record . . . is beyond our further review."); *Allende v. New York Health & Hosps. Corp.*, 90 N.Y.2d 333, 338 (1997) ("Affirmed factual

findings are beyond the scope of our review so long as they are supported by some evidence in the record."). The relevant affirmed facts that the Court cannot review in this case are: (1) at least $4.7 billion in additional operating aid is necessary and (2) the cost of necessary capital improvements is $9.179 billion.

Defendants' claim that the Appellate Division majority made a calculation error provides no independent basis for the Court's review and, in any event, there is no basis to conclude that the Appellate Division made the mistake that Defendants assert. First, Defendants cite no authority for their underlying assumption that this Court has the authority to rectify purported calculation errors in an appellate court's decision, particularly where, as here, the purported error concerns a fact about which there was no disagreement between the lower courts. Def. Br. at 40.

Second, in the proceedings below, Defendants advanced the same arguments and cited the same evidence in support of the $1.93 billion figure as they do on this appeal. The Referees, the Supreme Court and the Appellate Division all rejected Defendants' claims as a matter of fact. Far from misapplying Defendants' "methodology," the judges and referees referred to the $1.93 billion figure advanced by Defendants and concluded that the minimum required amount is substantially above $1.93 billion. *See, e.g.*, R.5843; R.15-17; Supp. R.9.

There is nothing on the face of any of the opinions below that suggests that any of the judges or referees confused the "constitutional minimum" that Defendants are now sponsoring with the "$4.7 billion the Governor proposed as a matter of policy." Def. Br. at 4. The Appellate Division expressly recognized that the Standard & Poor's Study ("S&P Study") relied upon by Defendants estimated "an annual spending gap for the City schools" that ranged from $1.93 to $4.69 billion. Supp. R.8-9. The Appellate Division also understood, however, that the actual compliance plan that Defendants submitted to the Referees – the Governor's plan – called for an additional $4.7 billion. Supp. R.7. Indeed, the dissent expressly recognized that the Appellate Division considered Defendants' $1.93 billion claim and that all five judges rejected it:

> Defendants continue to assert on appeal that a sound basic education can be provided for an additional $1.93 billion, but fail to provide support for that number. . . . *Therefore, the majority correctly ignores that suggested amount.*

Supp. R.38 (emphasis added). The dissent thus makes clear that the Appellate Division considered Defendants' claims regarding the $1.93 billion figure and made a factual determination to reject those claims.

B. The $1.93 Billion Figure Adopted by Defendants Is Not the Result of Any State Determination of the Actual Cost of Providing a Sound Basic Education

Even if the Court had the authority to reconsider how much money is necessary to provide a sound basic education in New York City, there is no factual basis in the record to adopt the $1.93 billion figure urged by Defendants. Defendants' claims regarding the $1.93 billion figure rest on the false premises that this figure represents a determination by the State that this is the amount of increased operating aid necessary to provide a sound basic education in the New York City schools and that such determination is entitled to deference. *See, e.g.*, Def. Br. at 40. Elsewhere in their brief, Defendants acknowledge that this claim is not true, admitting that the political branches remain divided on this issue, and that the Court's direction is necessary to bridge the divide. *Id.* at 66. And the Speaker of the Assembly expressly stated to the Referees that "[t]here is presently no 'State plan'" and that what Defendants characterize as a "State" plan was rejected repeatedly by the Legislature. R.6335. These admissions and facts alone are sufficient to dismiss Defendants' claims regarding the $1.93 billion figure.

The fact that the compliance plan submitted by Defendants to the Referees (the Governor's plan) called for a $4.7 billion increase provides an additional, independent basis to dismiss the $1.93 billion figure. Indeed, since Defendants asked the Referees to endorse the Governor's plan, Defendants should be estopped

as a matter of legal and factual integrity from claiming here that some lesser amount will satisfy their constitutional obligation. *See, e.g., Gen. Elec. Co. v. Inter-Am. Mktg. Sys.*, 220 A.D.2d 307, 307 (1st Dep't 1995) (dismissing defendant's counterclaims on grounds of judicial estoppel since defendant successfully advanced the diametrically opposite position at the trial of plaintiff's claims); *Kimco of New York, Inc. v. Devon*, 163 A.D.2d 573, 574 (2d Dep't 1990) (providing that "a litigant should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise") (citation omitted).

Moreover, even the most cursory review of the record demonstrates that Defendants' attachment to the $1.93 billion figure arose as a litigation-inspired argument rather than as an honest determination by any State actor concerning the cost of a sound basic education. In fact, Defendants never actually claim that any State actor made such a determination. Instead, Defendants say that the $1.93 billion figure is a "matter of mathematics," or is a result "that methodology produces." Def. Br. at 3, 46.

The best that Defendants can do in identifying the actors who had anything to do with the $1.93 billion figure is to say that unnamed "State defendants" chose, at an unspecified time, to rely on a "methodology" that supposedly produced a determination that an increase of $1.93 billion in operating aid would be sufficient

to provide a sound basic education in New York City. What the record actually reveals about the origin of the $1.93 billion figure is the following:

- Shortly after the Court issued its *CFE II* decision in June 2003, the Governor appointed the New York State Commission on Education Reform (the "Zarb Commission") to "study and make recommendations regarding . . . [t]he actual cost of providing all children the opportunity to acquire a sound basic education in the public schools of the *State of New York*." R.1028 (Exec. Order No. 131) (emphasis added). Although the Court of Appeals had specifically directed that the State determine actual costs in the *New York City* public schools, the Governor did not ask the Zarb Commission to determine this cost.

- The Zarb Commission sought to retain Standard & Poor's ("S&P") to assist it with the study requested by the Governor. The State Comptroller, however, determined 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. S&P then agreed to perform its work without charge. R.6340 (letter from Jane Conrad, Assistant Attorney General, to the Referees (Oct. 20, 2004)).

- S&P eventually produced the S&P Study, which was based on the "successful schools" methodology and included a range of figures that S&P describes as the "resource gap" between current spending in successful school districts and other districts throughout the State. The S&P Study included both total statewide resource gaps and New York City resource gaps.

- In the text of the S&P Study, S&P included sixteen different figures, not the eight figures used by Defendants, for the New York City resource gaps, ranging from a low of $1.93 billion to a high of $7.28 billion, depending on

what assumptions were used in the calculation.[1] In addition, S&P included a web-based EdResource Calculator in the S&P Study that allows the user to test other assumptions and obtain countless other outcomes, including totals substantially above $7.28 billion.[2] *In its report, S&P expressly stated that it "does not recommend any particular spending level.*" R.1039 (emphasis added).

- The Zarb Commission did not include any cost estimate for New York City in its March 2004 report. It provided only a statewide estimate, adopting the lower ranges of the S&P Study. R.988.

- In July 2004, the Governor called an extraordinary session of the Legislature for the sole purpose of enacting legislation to comply with the requirements of *CFE II*. At that session, he introduced a plan and a proposed bill under which "New York City schools will receive approximately $4.7 billion in additional support over the next five years." R.1148. The Governor's bill was introduced in the Senate, and a separate bill calling for approximately $6 billion in increases for New York City was introduced in the Assembly.

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[1] The illustrative figures included in the S&P Study were as follows:

		"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

R.1063.

[2] The EdResource Calculator is available online. *See* Standard & Poor's, *Performance Evaluation Services Website, at* http://pes.standardandpoors.com (last visited Aug. 11, 2006) (listed under New York State Calculator).

- The *CFE II* deadline passed on July 30, 2004 without enactment of the Governor's proposed legislation, the Assembly bill or any other legislation. Subsequently, the Referees requested that the parties submit their reform proposals. On August 12, 2004, Defendants submitted a "State Plan" that essentially incorporated the plan and the proposed legislation that the Governor had introduced at the extraordinary session. R.953. The introductory narrative to the "State Plan" states three times that the "State Plan thus provides for an increase of $4.7 billion in additional resources for New York City schools." R.955; *see also* R.943, 953. The "State Plan," while proposing a $4.7 billion increase, also claimed that a constitutionally adequate education could be provided for $1.93 billion. This is the earliest reference in the record to the $1.93 billion figure, and it came only after the remedial proceedings began.

- The "State Plan" misleadingly claimed that "[t]he S&P analysis, as adopted by the Zarb Commission and by State defendants, determined that a sound basic education could be provided in New York City with additional expenditures of slightly less than $2 billion." R.953. In fact, neither S&P nor the Zarb Commission made any such determination. *To the contrary, S&P expressly stated that its study was not intended to determine "[h]ow much spending is adequate to provide an opportunity for a sound, basic education;" instead, the Study was simply "intended to inform the deliberation surrounding policymakers' attempt to answer this question."* R.1039 (emphasis added).

In fact, no witness called in the proceedings before the Referees could testify about how Defendants adopted the $1.93 billion figure. And even though Defendants now base this appeal principally on a demand for deference to a purported determination that an additional $1.93 billion in operating funds is required to provide a sound basic education, they did not produce for testimony before the Referees anyone associated with the Zarb Commission or S&P, the entities whose work supposedly supports the $1.93 billion figure. Indeed, when pressed by the Referees, Defendants submitted an extraordinary letter explaining

that S&P *refused* to appear voluntarily, and Defendants never sought to compel the testimony of any S&P witness. R.6340-41.

Defendants called only one witness who claimed to have any first-hand knowledge of the Governor's plan. But that witness could not explain why or how the plan came to embrace $1.93 billion as a constitutional minimum while seeking approval of an actual spending program that would provide $4.7 billion to New York City schools. R.1978-79; R.1998-2005. The witness could not reconcile the two figures in any way or explain what minimally required resources the $1.93 billion would secure and what additional resources would be secured with the nearly $3 billion in additional funds proposed in the Governor's actual spending plan.[3] R.2002-06.

The only fair and reasonable conclusion that can be drawn from these facts is that the $1.93 billion estimate, advanced by Defendants only after the July 2004 deadline passed, was chosen as part of Defendants' litigation strategy simply because it was the lowest number yielded by the various combinations of variables in the S&P Study and not because anyone actually determined that this increase represented the actual cost of providing a sound basic education in New York City. There is no basis on these facts to conclude that $1.93 billion represents the State's

[3] One of Defendants' own experts testified that his review of the Governor's Plan and the S&P Study led him to conclude that a $6 billion increase was necessary to provide a sound basic education. R.1938.

determination of the actual cost of providing a sound basic education in New York City.

Defendants' claim that there is a distinction between a "constitutional threshold" or "constitutional minimum" amount (*i.e.*, $1.93 billion) and a "policy choice" (*i.e.*, $4.7 billion), *see* R.953, Def. Br. at 51, is also baseless. The Governor never suggested that $1.93 billion was a constitutional minimum when he submitted his plan and his proposed legislation in the extraordinary session. On the contrary, the Governor asserted that his $4.7 billion plan, together with his accountability measures, would "address all of the issues raised by the Court of Appeals in the CFE decision." R.1149.

Defendants' strained effort to distinguish between the supposed methodological determination of a "constitutional minimum" and the "policy preference[s]" that underlie the Governor's actual requested increase cannot be sustained. *See* Def. Br. at 51, 49. In the real world, no responsible State (or City) actor ever claimed to have a methodology divorced from an actual determination of the cost of providing a sound basic education. And no one claimed that there was an agreed-upon State methodology that generated a $1.93 billion estimate. It is telling, in fact, to contrast Defendants' use of the phrase "State defendants" with their use of "Governor." According to Defendants, the "State defendants" have a "method of calculating the minimum cost of a sound basic education." Def. Br. at

34. But it is "the Governor" who proposed a $4.7 billion increase as a "matter of policy," *id*. at 4, and it is the "Governor and the Legislature [who] have not agreed upon a comprehensive approach that fully resolves the issues raised by *CFE II*." *Id*. at 36.

All of the evidence in the record shows that all of the State and City officials and outside experts who considered this issue concluded that substantially more than $1.93 billion is necessary to provide a sound basic education. The Governor asked for $4.7 billion. R.953. The Assembly proposed a $6 billion increase. R.6202; *see also* Opening Br. at 18 n.4. The Board of Regents submitted a plan to the Referees that, far from endorsing the $1.93 billion figure as Defendants now imply, called for a $4.7 billion increase and ultimately endorsed the Referees' conclusions regarding the need for an additional $5.63 billion in operating aid. R.6268. The City Department of Education proposed a $5.3 billion increase. R.1307. And the outside experts who conducted Plaintiffs' exhaustive study concluded that an additional $5.6 billion is necessary. R.3471; *see also* R.35; Opening Br. at 18 (collecting and further detailing the funding figures recommended by the Plaintiffs, the Governor, the Regents, the City, and the Assembly).

Thus, it was entirely appropriate for the Referees, the Supreme Court and the Appellate Division to ignore Defendants' claim that the $1.93 billion figure should

be taken seriously. In fact, in the absence of any "State" determination of the actual cost of providing a sound basic education, the judges and referees properly considered all of the proposals submitted during the remedial proceedings.

There is, therefore, no need to address Defendants' lengthy and irrelevant claims about the specific variables used in the S&P model. The Appellate Division range of $4.7 billion to $5.63 billion is supported fully and independently by the weight of the various compliance proposals submitted to the Referees, not by the choice of particular variables in a single costing-out model.[4]

C. There Is No Factual Basis To Overturn the Lower Courts' Unanimous Judgment That the State Must Provide $9.179 Billion for Capital Projects

Shortly after the Appellate Division issued its order, the State enacted legislation that (1) provided $1.8 billion to cover the first year of the capital funding phase-in and (2) created a mechanism that would permit the City to raise an additional $9.4 billion by pledging future State building aid to repay the borrowed funds. Despite this clear acceptance by the political branches of the

[4] Moreover, for the reasons set forth by Justice Saxe in his dissent, the Appellate Division majority had no basis to overturn the findings of the Referees that $5.63 billion was the appropriate "actual cost" figure, since those findings were "supported by the record." R.15; *see also* Supp. R.35. Indeed, as the Supreme Court properly held, "[t]he report of a special referee should be confirmed if the findings therein are supported by the record." R.15; *see, e.g., Namer v. 152-54-56 W. 15th St. Realty Corp.*, 108 A.D.2d 705, 705 (1st Dep't 1985) ("The report of a referee should be confirmed if the findings therein are supported by the record."). While we agree with the dissenting Appellate Division justices on this issue, we have not contested on this appeal the $4.7-$5.6 billion range upheld by the Appellate Division majority, and, therefore, issues regarding the costing-out methodology utilized by the Referees are not relevant to the current appeal.

amount necessary to correct capital deficiencies, Defendants inexplicably challenge the unanimous agreement among the lower court judges and referees regarding the $9.179 billion capital funding requirement.

There is no basis for the Court to consider Defendants' belated challenge. Because Defendants failed to offer below any capital plan of their own or even to calculate the costs of fixing the City's capital deficiencies, both the Supreme Court and the Appellate Division properly accepted the BRICKS plan as the only capital funding plan supported by the evidence. R.18, Supp. R.27. In fact, the only witness offered by Defendants concerning capital and facilities issues endorsed the BRICKS plan included in Plaintiffs' compliance plan. R.2124 (testimony of Charles Szuberla). As the Appellate Division summarized the record:

> The Referees adopted plaintiffs' proposed $9.179 billion five-year capital improvement plan to address overcrowding, reduce class sizes, provide computers and other technology, and create libraries, laboratories, and auditoriums. Defendants have neither presented evidence concerning the expected cost of capital projects nor outlined a basic plan.

Supp. R.27. As a result, the Appellate Division concluded that "the State's failure to refute it or offer an alternative indicates that the finding of Supreme Court with respect to a capital plan was not erroneous." *Id.*

Second, none of the purported factual criticisms of the BRICKS plan that Defendants now improperly ask this Court to consider are correct, as the Referees and the Appellate Division have already determined. The record is clear that:

- Contrary to Defendants' suggestions, the judges below recognized that the BRICKS plan and the City capital plan differ. The BRICKS proposal was specifically targeted to meet the *CFE II* mandate and included no other capital projects, while the City plan was not based on the *CFE II* mandate and therefore included many costs that are not required to comply with *CFE II* while omitting some costs that are required. *See* R.5864-67.

- The BRICKS plan did not ignore the prospect of declining enrollment, as Defendants claim. To the contrary, the BRICKS plan unambiguously *assumed* declining enrollment by using projected 2012 enrollment figures "even though current enrollment is greater than projected 2012 enrollment." R.3373. Not only were these projected 2012 figures the lowest future enrollment projections available, but they were used in the BRICKS plan even at the cost of depriving some students of seats until 2012. R.3374.[5]

- With respect to class size, Defendants offer no alternative for the statewide class-size assumptions used in the BRICKS plan. Moreover, the "successful schools" model on which Defendants rely to support their attack on the Appellate Division's conclusions regarding the cost of a sound basic education is based on the assumption that statewide comparisons make sense. In any event, the record is clear that New York City students may need even smaller class sizes than students elsewhere in the State because of their special needs. R.3373-74; *see also CFE II*, 100 N.Y.2d at 912.

There are only two remaining issues regarding capital funding that need to be considered by this Court. First, although the recent legislation authorizes the full amount needed to fund the BRICKS program, it contains no accountability

[5] The BRICKS plan further minimized projected costs by analyzing elementary and middle school capacity on a borough-wide basis rather than by Community School District, as the Board of Education's Division of School Facilities does. *Id.*

structures to ensure that these funds are in fact used to eliminate the constitutional deficiencies identified in *CFE II*. The parties agree that the City's comprehensive education plan should be required to describe with specificity how the additional capital funds are being expended to remedy the unconstitutional facilities deficiencies. Opening Br. at 49; Def. Br. at 55. The Court, therefore, should adopt specific language to accomplish that end. *See infra* at Subsection IV.A.

Second, after clearly stating that the lower court's findings on the capital funding issue, including the specific $9.179 billion figure, were "not erroneous," the Appellate Division issued an ambiguous order that required Defendants to "implement a capital improvement plan that expends $9.179 billion over the next five years *or otherwise satisfies the City schools' constitutionally recognized capital needs*." Supp. R.29-30 (emphasis added). The italicized phrase has no evidentiary basis in the record, and its vagueness suggests that the State can avoid ensuring that the facilities needs identified in the BRICKS plan are met. To avoid this possibility and the need for judicial review of any alternative plan, the Court should either strike the italicized phrase or reinstate the clear language in paragraph (d) of the Supreme Court's order, which unambiguously requires the

expenditure of $1.836 billion per year for five years to implement a capital funding plan.[6] R.9.

II. THIS COURT SHOULD ISSUE A SPECIFIC, ENFORCEABLE ORDER REQUIRING THE STATE TO ENSURE THAT NEW YORK CITY HAS SUFFICIENT FUNDS TO PROVIDE A SOUND BASIC EDUCATION

At every stage of the compliance proceedings below, Defendants asked the Referees and the courts to refrain from issuing an enforceable compliance order, insisting that the judiciary could issue only advisory opinions. Defendants claimed that the courts could then expect the moral force of their opinions to inspire prompt compliance. *See, e.g.*, R.3034-35; R.5924; Def. App. Div. Br. at 42-43. But the orders below, stayed pending appeal, have failed to prompt full compliance.

Now, Defendants claim once again that such a declaration by this Court "will likely dispel the uncertainty among elected leaders as to the amount of money necessary to provide students in New York City with a sound basic education." Def. Br. at 66. They ask the Court to limit relief to an unenforceable advisory opinion that Defendants can safely ignore if political expediency so requires. *Id*.

There is no constitutional or jurisprudential reason for the Court to stay its hand any longer. The Court should now order the political branches to ensure that

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[6] Defendants' argument that the State's recent enactment of a capital funding plan fully meets the $9.179 billion requirement of the Appellate Division order and therefore renders a continuing judicial directive unnecessary is spurious. *See* Def. Br. at 58. Except for the initial $1.8 billion appropriation, the bulk of the capital plan is an authorization for future funding that could be revoked at any time.

a specific amount of funds is provided to the New York City school system. Such an order would be consistent with *CFE II*, the weight of federal and other state precedent and with the Court's responsibility to secure compliance with its orders.

A. No Constitutional or Legal Principle Prohibits This Court From Issuing an Enforceable Order Requiring the State To Ensure That a Specific Amount of Money Is Made Available to the New York City Schools

None of what Defendants say about the Court's constitutional powers addresses the key issue raised on this appeal: Does the Court have the authority to order the State to ensure that a minimum amount of money is made available to a public school system in order to remedy long-standing constitutional harms? And Defendants completely ignore the language of *CFE II*, cited in our opening brief, which has already answered this question affirmatively. Opening Br. at 30-31.

In *CFE II*, the Court expressly rejected Defendants' claim, which they nevertheless urge yet again, that the Court can do no more than issue an advisory opinion "simply direct[ing] the proper parties to eliminate the deficiencies." 100 N.Y.2d at 925. The Court made clear that it has the responsibility to "safeguard" important constitutional rights and to "order redress for violation of them." *Id.* The law of the case, therefore, precludes Defendants' argument in Part IV of their brief, Def. Br. at 61, that the Court lacks authority to issue an order enforcing its constitutional mandate. *See, e.g.*, *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165

(1975) ("The doctrine of the 'law of the case' is a rule of practice . . . that, when an issue is once judicially determined, that should be the end of the matter.").

As we said in our opening brief, the Court's direction in *CFE II* is clear: Determine the cost, provide the resources and measure the results. Opening Br. at 30. Since the Governor and the Legislature failed to follow this mandate, the Court must now tell the State more explicitly what to do, including identifying the specific cost and ordering that sufficient funds be provided to meet that cost. Defendants' recital of separation of powers truisms provides no basis to question the Court's authority to enforce its earlier order with a more specific direction in the face of the State's default. The issue here is one of constitutional compliance, not the normal division of functions among the three branches of government. The Court must act now to ensure compliance in the face of legislative and executive impasse.

Nothing in the State Constitution and nothing in this Court's prior decisions precludes the Court from ordering the State to take action that will require the appropriation and expenditure of public funds, whether State or local. To the contrary, as we described in our opening brief, many of this Court's decisions and the decisions of the lower courts contemplate or require the expenditure of public funds. *See, e.g.*, *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537 (1984) (holding that failure to provide suitable and adequate treatment to mentally ill patients "cannot

be justified by lack of staff or facilities");[7] *Aliessa v. Novello*, 96 N.Y.2d 418, 421 (2001) (striking down state Medicaid provision that denied medical assistance to certain groups of immigrants); *Natural Res. Def. Council v. New York City Dep't of Sanitation*, 83 N.Y.2d 215, 220 (1994) (requiring New York Department of Sanitation to implement recycling law despite inadequate funding by the City Council); *Jiggetts v. Grinker*, 75 N.Y.2d 411, 415 (1990) (requiring social services commissioner to establish a rent subsidy allowance reasonably related to the cost of housing in New York City).

Defendants rely principally on Article VII of the Constitution for their separation of powers claims. *See* Def. Br. at 62-65. But Article VII has nothing to do with the issue now before the Court, and Defendants appear to have confused the authority of the courts to issue orders that require the expenditure of public money with the separate authority that resides with the Governor and the Legislature to actually appropriate and disburse public funds. Article VII is concerned solely with the relative powers of the executive and legislative branches in the appropriation and expenditure of state funds. N.Y. Const. art. VII, §§ 3-7. Nothing in the text of this provision and nothing in its constitutional history

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[7] Defendants' lengthy discussion of *Klostermann* is largely irrelevant. *See* Def. Br. at 66-68. *Klostermann* does not involve any issue of non-compliance with a court directive. Furthermore, the Court there 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." *Klostermann*, 61 N.Y.2d at 535.

suggests that it was intended to limit the judiciary or the enforcement of judicial orders.[8]

Of course, the judiciary cannot actually appropriate funds and has no authority to disburse funds. We are not asking the Court to do either. What the Court clearly can do is issue an order that will require the Governor and the Legislature to exercise their powers to ensure that a minimum amount of funds are made available to the New York City school system. If the Governor and the Legislature fail to obey that order, the Court cannot appropriate or disburse the funds, but Plaintiffs will have the right to pursue appropriate contempt proceedings and other remedies against the State and State actors. *See* Opening Br. at 53-55.

Defendants' continued insistence that the Court should only provide advice to the political branches rather than a direct order is particularly offensive in light of the State's failure to comply with the Court's deferential guidance in *CFE II.*

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[8] Article VII 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. *See* Peter J. Galie, *The New York State Constitution: A Reference Guide* 171 (1991); 2 Charles Z. Lincoln, *Constitutional History of New York* 183-84 (1906); *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). Defendants invoke *People ex rel. Broderick v. Morton*, 156 N.Y. 136 (1898), for the proposition that the judiciary has no authority to order the Governor or Legislature to perform a specific act. Def. Br. at 69 n.14. *Broderick* dealt with the archaic question of whether common law writs could be issued personally against the Governor, who is acting in "the king's name." *Broderick*, 156 N.Y. at 145. Thus, *Broderick* involved a justiciability issue that is irrelevant to the current controversy, and given the fact that the CPLR now clearly permits suits against the Governor, *see, e.g.*, *Klostermann,* 61 N.Y.2d at 525, it is questionable whether *Broderick* retains any precedential significance.

Even in the absence of explicit authority, it is intuitive and obvious that "courts have inherent power to enforce compliance with their lawful orders." *Spallone v. United States*, 493 U.S. 265, 276 (1990). As Justice Saxe explained in his dissent:

> In view of the ongoing, persistent legislative inaction, we *must* have the authority to direct the enactment of legislation, rather than merely direct that the Legislature consider taking action; otherwise, there could be no enforceable remedy for a legislative failure to correct its constitutionally deficient expenditure.

Supp. R.48 (emphasis in original).

Defendants themselves acknowledge that "under certain extraordinary circumstances" a court might be able to issue directives that "require the executive and legislature to appropriate or otherwise provide specific sums of money." Def. Br. at 61-62; *see also id*. at 69. It is difficult to imagine circumstances that could be more "extraordinary" than the failure of the political branches to follow this Court's order requiring the State to cure a grave constitutional harm.

Even now, three years after *CFE II* was decided, the order that we seek from the Court with respect to operating funds would be a measured response, permitting Defendants to choose a specific figure within the $4.7 billion to $5.6 billion range, and deferring substantially to the political branches to determine how much of the necessary increase in funding should be borne by the City, how the needed revenues would be raised, how the funding formulas should be revised and how the increases would be phased in over the four-year period. In addition, the

order we seek would tie the expenditure of funds to accountability measures that would be developed and implemented by City and State education officials, not the judiciary. Such an order will balance the Court's responsibility to enforce the Constitution with an ongoing respect for legislative and executive policy-making prerogatives.

B. Federal Courts and Courts in Other States Have Consistently Upheld Enforcement Orders in Similar Situations

Defendants correctly note that there is only limited guidance in this Court's jurisprudence concerning the power of the Court to enforce compliance with its orders. This fact underscores the unprecedented nature of the current appeal and its background; in the past, the political branches have respected and complied with the Court's orders. Given the dearth of New York authority, it is instructive to look to the decisions of federal courts and other state courts that have faced the difficulty of compelling reluctant state officials to remedy constitutional wrongs.[9]

The major federal precedents, of course, involve the sustained patterns of resistance to the U.S. Supreme Court's school desegregation mandate in *Brown v. Board of Education*, 349 U.S. 294 (1955). Defendants ignore these cases, which describe the enforcement actions that the federal courts have taken to uphold the

[9] The Referees, after stating that "New York courts have broad discretion to fashion equitable remedies," appropriately looked to precedents from federal courts and from courts in other states that had confronted official resistance to court decrees. R.5879 (citing N.Y. Const. art. VI, § 7(a); N.Y. C.P.L.R. 3017(a); *Kaminsky v. Kahn*, 23 A.D.2d 231, 237 (1st Dep't 1965)).

integrity of the judicial process and to ensure that school children's constitutional rights were vindicated.

Federal courts have frequently ordered state governments to undertake actions requiring the expenditure of public funds to integrate public schools. *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 280-83 (1977) (ordering state to pay one-half of the additional costs of education programs to assist children who had been subjected to racial discrimination); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (ordering school district to implement court-designed desegregation plan); *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984) (en banc) (affirming district court order requiring state, *inter alia*, to pay full cost of student transfers between city and suburban school districts and one-half of certain "quality education" programs); *Arthur v. Nyquist*, 712 F.2d 809, 815 (2d Cir. 1983) (ordering Buffalo City Council to appropriate an additional $7.4 million to its school district); *see also Missouri v. Jenkins*, 495 U.S. 33 (1990) (holding that district court could order school district to raise property taxes to implement desegregation remedy, although court could not set tax levy rate itself). These federal courts ordered the states to assume these costs even in the face of claims that they were infringing on the policy prerogatives of the political branches.

Defendants acknowledge the relevance of the decisions of other state courts in school funding cases, but they grossly distort the holdings in the state court

decisions that they cite and omit any reference to the major state court decisions that are directly on point. Rather than supporting Defendants' position, the state cases only serve to highlight the extraordinary nature of the non-compliance by the political branches in New York State.

Thus, the Massachusetts decisions, far from cautioning against judicial action, *see* Def. Br. at 70, show that school funding litigation can be resolved successfully when the political branches promptly and faithfully meet their constitutional obligations. In Massachusetts, the Governor and the Legislature took dramatic, timely steps to comply with the 1993 court decision invalidating its state education finance system. *McDuffy v. Sec'y of Executive Office of Educ.*, 415 Mass. 545, 615 N.E.2d 516 (1993). Within days of the issuance of the *McDuffy* decision, the legislature enacted an omnibus Education Reform Act that "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." *Hancock v. Comm'r of Educ.*, 443 Mass. 428, 432, 822 N.E.2d 1134, 1138 (2005). A multi-year phase-in of the new foundation funding system resulted in an increase in funding from "$3.6 billion in fiscal year (FY) 1993, prior to passage of the act, to $10.1 billion in FY 2002." *Id.* at 445, 822 N.E. at 1147.

Despite this record of compliance, the plaintiffs sought a follow-up court order to deal with continuing needs in certain "focus" districts. The Supreme Judicial Court of Massachusetts denied relief because of its expectation, based on the established pattern of constitutional compliance, that "the Governor and the Legislature will continue to work expeditiously to provide a high quality public education to every child." *Id.* at 462, 822 N.E. at 1158 (internal citations omitted).[10]

Defendants' reference to the North Carolina school funding case, *Hoke County Board of Education v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004), also ignores the critical distinction noted by Justice Saxe that in North Carolina, as in Massachusetts, defendants "began acting to remedy the constitutional violation immediately after the trial court's decision, and continued to allocate increasing amounts [of funding] to their high-need districts." Supp. R.51. Moreover, the

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[10] In its 2005 *Hancock* decision, the Massachusetts court referred to *CFE II* and described the difference between the situation in Massachusetts and in New York as follows:

> In . . . *CFE*, the . . . [C]ourt[] stepped in, only reluctantly, after many years of legislative failure or inability to enact education reforms and to commit resources to implement those reforms, a circumstance not present here . . . . The level of responsive, sustained, intense legislative commitment to public education established on the record in this case is the kind of government action the . . . *CFE* courts . . . had hoped to see from their Legislature[], and reluctantly concluded would not be forthcoming without a detailed court order.

Id. at 455-56, 822 N.E.2d at 1153-54 (citations omitted).

cited decision came at the liability and initial remedy stage, not a later proceeding dealing with a serious question of non-compliance. In crafting its basic remedial decrees, the North Carolina Supreme Court, like this Court in *CFE II*, was properly concerned with separation of powers restraints and modified some of the relief recommended by the Supreme Court, just as this Court did in *CFE II*. As Justice Saxe observed, "[t]here is no reason to believe that if faced with total inaction following this directive, the North Carolina court would assume itself to be powerless to make any further direction." *Id*.

Significantly, Defendants fail to address *Montoy v. State*, 279 Kan. 817, 112 P.3d 923 (2005). In *Montoy*, the Kansas Supreme Court's actions to enforce its orders and uphold the requirements of its state constitution in response to the legislature's failure to meet the court's initial compliance deadline led to prompt compliance from the political branches, and the Kansas litigation was therefore terminated just eighteen months after the initial ruling invalidating that state's education finance system.

Specifically, after invalidating the Kansas state education finance system, the Kansas Supreme Court issued an enforceable compliance edict, directing the legislature to enact appropriate remedial legislation within six months. *Id*. at 819, 112 P.3d at 926. Although the legislature increased education spending modestly by the deadline, the court held that the increase fell far short of the amount needed

to provide a "suitable education" as determined by the State's own costing-out study.[11] The court therefore gave the legislature another month to double its initial appropriations for the upcoming school year. *Id*. at 845-46, 112 P.3d at 940-41.

After the legislature failed to meet the new deadline, the court set the matter down for an immediate hearing. On the eve of the hearing, the legislature provided the full increase called for in the court's order. Ten months later, the state completely revamped its system of financing public education. *Montoy v. State*, No. 92,032, 2006 WL 2088176, at *4-5 (Kan. July 28, 2006) ("*Montoy IV*"). Just last month, the Kansas Supreme Court ruled that the new legislation complied with the court's prior orders and terminated the case. *Id*. at *9-13 (detailing history of events).

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

> Nor should doubts about the court's equitable power to spur legislative action or to reject deficient legislation

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[11] The Appellate Division majority attempted to distinguish *Montoy* by contrasting the fact that the amount of funding sought by plaintiffs there was supported by a record that contained only one costing-out study that had been commissioned by the legislature itself and was endorsed by the state education department. Supp. R.26-27. The Court ignored, however, the relevant aspect of *Montoy* for present purposes, namely the fact that there, as here, the legislature had refused to implement a direct order of the state's highest court and, in the face of separation of powers objections, that the highest state court there issued an enforceable compliance edict. *Montoy*, 279 Kan. at 826, 112 P.3d at 929. *See also* Supp. R.51.

> 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.

Montoy, 279 Kan. at 828, 112 P.3d at 931 (internal citation omitted); *see also State v. Campbell County Sch. Dist*., 2001 WY 90, ¶ 33, 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."); *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 01-836, 2005 WL 1358308, at *3 (Ark. June 9, 2005) (Glaze, J., concurring) ("When, as here, we have taken upon ourselves the daunting task of ensuring compliance with our constitutional mandate for a 'general, suitable, and efficient system of free public schools,' 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.") (citation omitted).

III. NO FURTHER DELAY OR DEFERENCE IS JUSTIFIED EITHER BY THE STATE'S RECENT REMEDIAL ACTIONS OR BY THE MAGNITUDE OF THE REMEDY

A. The State's Continuing Non-Compliance Is Undisputed, and Recent Modest Funding Increases Do Not Satisfy *CFE II*

As they did in 2003, Defendants once again ask this Court to stay its remedial hand because the State purportedly "has taken substantial steps toward fulfilling its constitutional responsibilities." Def. Br. at 1. As the State admits,

however, the *ad hoc* increases in operational funds provided in recent years fall far short of the "comprehensive approach" necessary to "fully resolve[] the issues raised by *CFE II*." *Id*. at 36. There has been no serious reform of the State education financing system to ensure that funding is aligned with need or that each school in New York City has the resources necessary to provide a sound basic education. *CFE II*, 100 N.Y.2d at 930. Instead, State funding continues to be dictated by the discredited "shares" approach, and actual funding increases have not come close to meeting the need identified in any of the various compliance plans submitted below by State and City officials. *See* Opening Br. at 26-28.[12]

Indeed, since Defendants acknowledge that more money is needed and that the Court must tell the political branches exactly how much more money is needed, Def. Br. at 66, 73-75, Defendants' recitation of minimal annual increases in funding for the New York City schools is not relevant on this appeal. Defendants offer nothing that provides any basis to overturn the clear finding of the Appellate Division that "[i]t is undisputed that the State has failed to appropriate an adequate

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[12] With regard to operating funds, the increase in aid to New York City in the 2006-07 state budget, Def. Br. at 36-37, amounts to less than 5% of the overall $10 billion increase in State spending in the 2006-07 budget over the 2005-06 budget. *See* New York State Office of the State Comptroller, Bureau of Budget & Policy Analysis, *Fact Sheet: What Happened to the 2006-07 Supplemental Budget?*, *at* http://osc.state.ny.us/reports/budget/2006/supp_budget_factsht.pdf (last visited Aug. 11, 2006). This limited increase is not a reflection of any true constraints on the State's fiscal capacity to comply with the Court's order, but simply the result of the same 38.86% shares agreement that has been in place for decades. *See* Opening Br. at 26.

amount of funding to meet its educational mandate as outlined in *CFE II*." Supp. R.24; *see also* R.13 (Supreme Court decision) ("The referees have found that the defendants have failed to comply with any of the Court of Appeals' mandates.").

Not only are Defendants' spending and demographic figures and estimates irrelevant, they are incomplete and misleading. For example, Defendants claim that State aid and City school expenditures have increased significantly, Def. Br. at 37, but Defendants fail to account for the effect of inflation and fail to recognize that the Supreme Court's order already factored in actual or projected increases for several years into the cost figures that are presently before this Court.

Defendants also expressly admit that the figures they cite are taken from sources that differ substantially from the data sources used in the record below.[13]

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[13] Defendants' admission that "the numbers shown on the City's website may not be directly comparable to those in the State defendants' study" is a glaring understatement. Def. Br. at 38. In fact, the statistics used in Defendants' brief differ from the databases in the record in that:

- The databases used in both the S&P analysis and the study conducted by American Institutes for Research and Management Analysis and Planning, Inc. and submitted by the Plaintiffs were based on the State Education Department ("SED") "School District Fiscal Profiles," and on uniform standardized annual financial reports (form ST-3) that all school districts are required to submit each year and on which the Fiscal Profiles are based. The estimates and projections in the table from the City's website, *see* Def. Br. at 38, do not correspond to the SED Fiscal Profile figures for the years covered by both sources (2001-02, 2002-03 and 2004-05) and are unlikely to correspond to the SED Fiscal Profile figures for the years for which the Fiscal Profiles have not yet been completed.

- The enrollment decline figures cited by Defendants do not include students enrolled in charter schools, contract schools and various pre-kindergarten facilities even though these students are included in the measure of enrollment utilized by S&P from the SED Fiscal Profiles. *See* R.1132 n.34, R.1134 n.65, R.1135 n.69.

In addition, the cited figures also include expenditures for transportation, debt service, pension contribution rate escalations, and other expenditures that were excluded in the calculations of need included in all of the compliance plans in the record. *See* R.363 n.67; R.1055.[14]

In any event, it is not necessary for the Court to resolve any issues of fact concerning the State's recent actions. Even with their statistical errors, Defendants cannot and do not claim to have satisfied the operating needs of the New York City schools and, for that reason, the minimal recent increases provide no basis for the Court to refrain from issuing a clear remedial order.

Moreover, even if any recent State or City actions or demographic changes provide a basis for adjusting the Appellate Division range, the proper action is not deference by this Court but adherence to the mechanism set out by the Supreme Court in its order confirming the Referees' report. In that order, the Supreme Court provided an appropriate mechanism for any such modification by specifically providing that the annual operating aid increases it was ordering would need to be adjusted each year "for inflationary increases and to reflect any changes in school enrollment." R.8 n.3. Because it is not the function of this Court to reconsider evidentiary findings or to update figures in the record, the Court should

[14] Similarly, the $1 billion in additional State aid cited by Defendants, Def. Br. at 37, also covers transportation, building aid and other categories that were not included in the cost calculations in the record.

confirm the range of total operations funding amounts ordered by the Appellate Division and otherwise affirm the Supreme Court's order, which provides for any necessary adjustment.

B. The Magnitude of the Remedy Provides No Basis To Limit This Court's Remedial Order

For thirteen years, Defendants told the courts that New York City schools did not require any additional funding because the schools were providing an adequate education or that more resources would not make any difference because of the socioeconomic circumstances that were alleged to inhibit the ability of poor children to learn. And Defendants constantly urged the courts not to usurp the policy and spending prerogatives of the political branches. They continue to warn the Court on this appeal that it should not issue an order requiring the expenditure of "billions of dollars a year for years to come." Def. Br. at 3.

Now that State and City officials have submitted compliance plans recognizing the need for additional "billions of dollars," Defendants' warnings ring hollow. It was, of course, the Governor, not judges, who submitted a compliance plan to the Referees calling for a $4.7 billion increase in operating aid. Moreover, as the record shows, every responsible State official has known for years that it will take large amounts of money to remedy the failings of the New York City school system, and no plan submitted by the various State and City officials called for less than a $4.7 billion increase. *See, e.g.*, R.2669. If the Court orders the State

to ensure that this bill is paid, therefore, it will not be an act of judicial usurpation but a confirmation of what all of the responsible State and City officials (and independent experts) have concluded on their own.

The magnitude of the necessary increases did not frighten the Governor from asking for this money from the Legislature in the extraordinary session he convened in July 2004. In fact, Defendants asked the Referees to approve a plan seeking such an increase. R.3038. In addition, the Assembly forwarded a plan to the Referees calling for a $6 billion increase and made no argument that the magnitude of such an increase should preclude a judicial order requiring that such an amount be provided. R.6166, 6202.

Nor is there any basis in the record to make such an argument. The $4.7 billion to $5.63 billion operating fund increase identified by the Appellate Division, which would be phased in over four years, represents about three percent of the combined State and City budgets of approximately $168 billion.[15] Even without considering any substantial change in fiscal structure, reallocation of resources or additional revenue sources, the State and the City plainly have the

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[15] *See* New York City Office of the Comptroller, Bureau of Fiscal & Budget Studies, *The Comptroller's Comments on the Adopted Budget for Fiscal Year 2007 and the Financial Plan for Fiscal Years 2007-2010, at* http://www.comptroller.nyc.gov/bureaus/bud/06reports/JULY2006AdoptedBudget.pdf (last visited Aug. 11, 2006); New York State Office of the State Comptroller, Bureau of Budget & Policy Analysis, *Fact Sheet: What Happened to the 2006-07 Supplemental Budget?, at* http://osc.state.ny.us/reports/budget/2006/supp_budget_factsht.pdf (last visited Aug. 11, 2006).

fiscal capacity to meet the constitutional obligation. With respect to capital funds, the State has already adopted a plan to provide funding for $9.179 billion in capital expenditures, which are typically financed over 30 years.

Moreover, the remedy that we propose would allow the Legislature and the Governor considerable discretion over matters of education policy and finance. It will be up to the political branches to determine how any increases will be shared between the City and State, from what sources additional funds will come and whether and how increases will be tied to specific operational needs. And it will be up to the political branches, together with the Board of Regents and the State Education Department, to set the education policies and accountability measures necessary to ensure that New York City provides a sound basic education.

Nothing, of course, that the courts have done in the course of this litigation has prevented the State from reaching a consensus as to the cost of providing a sound basic education and implementing the necessary education finance and other reforms to ensure that the City schools received sufficient funds to meet this cost.[16]

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[16] Defendants have, in fact, taken advantage of the judicial process to provide cover for their continuing non-compliance. Although the automatic stay provisions of CPLR 5519(a) permitted Defendants to defer compliance with the specifics of the Supreme Court's order, they were at all times since July 30, 2004 under a continuing obligation to obey this Court's *CFE II* directive. If Defendants believed that $5.63 billion was not the "actual cost" of providing a sound basic education, they could have and should have enacted legislation identifying another amount as the proper figure and taken steps to promptly provide that amount to New York City's school children. After the July 2004 extraordinary session reached an impasse, the Governor never called another special session or took any other serious steps to promote compliance.

But in the face of the State's admitted failure to act and in the face of repeated statements by the State's political leaders that they cannot act without the Court's direction, neither the magnitude of the remedy nor any other reason offered by the State should stay the Court's remedial hand.

The State's inaction requires the Court to speak firmly and to demand that the Governor and Legislature meet their constitutional responsibilities. Their continued failure to do so works a continuing harm on the children of New York City and on the integrity of our constitutional system. As this Court has explained:

> 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, 89 N.Y.2d 172, 196 (1996).[17]

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[17] 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:

> [C]itizens 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 supercourt 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 bedrock principle of separation of powers would become a shattered mass of scattered fragments.

Mandel v. Myers, 29 Cal. 3d 531, 532, 629 P.2d 935, 948 (1981).

The principle of judicial review – a key element of our constitutional system – has remained vibrant for over 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. The continuing defiance of a clear constitutional mandate of New York State's highest court – unprecedented in the State's history – undermines the principle of judicial review and the rule of law.

IV. THIS COURT SHOULD REINSTATE THE SUPREME COURT'S ACCOUNTABILITY AND COSTING-OUT PROVISIONS

A. This Court Should Accept the Parties' Joint Request To Restore the Accountability Provisions

Defendants' brief confirms their accord with Plaintiffs' position, Opening Br. at 40-50, on the importance of the Supreme Court's comprehensive planning and annual reporting provisions that were inexplicably deleted by the Appellate Division. Def. Br. at 58-60. Defendants' concurrence is particularly significant because it acknowledges that without an enforceable court order, the legislative impasse that has blocked enactment of these important accountability enhancements, as well as the operating aid increases, will continue. Because the parties agree on the specific language of the Supreme Court's order on these points, R.10-11, those provisions clearly should be reinstated.

The parties also agree that recent legislation providing a mechanism for funding $9.179 billion in capital improvements is not sufficient to ensure that the new funds actually remedy the facilities deficiencies identified in *CFE II*. Opening Br. at 40; Def. Br. at 60. To correct this deficiency, the Supreme Court's order with respect to comprehensive planning should be modified to ensure that capital funds are being expended to remedy the facilities deficiencies identified in *CFE II*.

Defendants have not objected to Plaintiffs' additional request that the Court reinstate the Supreme Court's requirement for a four-year phase-in of the increase in operational funding and that the disbursement of funds during the four-year period be flexibly linked to effective implementation of the specific initiatives described in the comprehensive plan. Opening Br. at 47-48. This additional accountability enhancement should be included in the Court's final directive.

B. Future Costing-Out Studies Are Necessary To Promote Continuing Constitutional Compliance Without Ongoing Judicial Supervision

Defendants' objections to costing-out studies are based in part on the erroneous assumption that the Supreme Court's order would bind the State to the specific methodologies used by the parties in the past, Def. Br. at 77, which it does not. *See* R.8-9 ("[I]f the Regents, with the consent of defendants, determine that alternative methodologies . . . are more appropriate, such alternative or modified methodologies may be utilized."). Defendants also misread the Supreme Court's

order in alleging that the Regents' role in designing and supervising these studies would "giv[e] the Regents a dominant role in the budget-making process, even though that role properly belongs to the Executive and the Legislature." Def. Br. at 78.

To the contrary, the Supreme Court's costing-out provisions direct the State to "use[]" these costing-out studies in their determinations regarding the annual education appropriations. R.9-10. They do not compel the Legislature to fully adopt the results. As the Kansas Supreme Court held recently in *Montoy IV*, "[t]he legislature is not bound to adopt . . . the 'actual costs' as determined by the [costing-out] studies. On the other hand, the legislature cannot ignore the [present cost] study as it did the A&M study [last year]." 2006 WL 2088176, at *11. Cost studies should regularly be used in the future not to substitute for the Legislature's budget making responsibilities, but "to assist the legislature in the gathering of information which is necessary for the legislature's consideration when meeting its constitutional duties." *Id*.

Future cost studies will not perpetuate judicial review, as Defendants claim. Def. Br. at 77. Instead, as the Kansas Supreme Court recognized in the *Montoy* litigation, the cost studies required by the Supreme Court's order will furnish a reliable database to guide legislative decision-making. The cost studies will also

provide a useful, comprehensible mechanism that will promote greater accountability to the public without ongoing judicial supervision.

Given the long history of legislative and executive indifference to aligning funding with need in education finance, it is particularly important that a mechanism be put in place that can promote ongoing constitutional compliance. As illustrated by the recent events in Kansas, regular use of cost studies in the annual budget process can foster compliance and reduce the risk that the courts will be drawn back into education spending issues.

V. THIS COURT SHOULD RETAIN JURISDICTION TO ENSURE PROMPT COMPLIANCE WITH ITS DECISION ON THIS APPEAL

To ensure that Defendants' continuing non-compliance is promptly ended, we requested that the Court retain jurisdiction for a short period so that it can expeditiously direct any immediate enforcement proceedings that may be necessary. The highest state courts in six other states have retained jurisdiction in analogous circumstances. Opening Br. at 53-57. Defendants erroneously argue that the Court lacks the power to do so because its authority is limited only to the "review of questions of law except in narrow circumstances." Def. Br. at 75 (internal quotation omitted).

In fact, in the "narrow circumstance" of a violation of its own orders, the Court does have the authority to adopt special procedures to uphold the integrity of its order. Thus, in *McCormick v. Axelrod*, 59 N.Y.2d 574 (1983), where the

Commissioner of Health allegedly had continued to discharge patients from a nursing home in defiance of an order from this Court ordering him not to do so pending determination of an appeal, the Court empowered a Supreme Court Justice to hold an evidentiary hearing. The record of that hearing was submitted directly to this Court, and, based on that record, the Court held the Commissioner and other defendants in civil contempt. *Id.* at 587*; accord Dep't of Envtl. Prot. v. Dep't of Envtl. Conservation*, 70 N.Y.2d 233 (1987) (referring allegations of violation of stay to Supreme Court Justice for hearing and holding defendant in criminal contempt based on evidentiary record compiled at that hearing). *See also* N.Y. Jud. Law § 2-b (McKinney 2006) (a court may "devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it"); *People v. Ricardo B.*, 73 N.Y.2d 228, 233 (1989) ("The courts may adopt new procedures which are fair and which facilitate the performance of their responsibilities.").

Plaintiffs expect that the State will promptly comply with any specific directive this Court may issue in regard to this appeal. However, to ensure that State officials understand the need for prompt action, the Court should convene a hearing ninety days after issuance of its Order for the parties to report on the state of compliance and to determine what further action or sanctions are required. *See* Opening Br. at 53-55. If factual issues are in dispute, the Court should authorize

Justice DeGrasse or a referee to hold an evidentiary hearing and promptly file a report directly with the Court.[18]

CONCLUSION

We hope and expect that this will be our last submission to the Court. The circumstances that have prolonged this litigation for more than thirteen years have changed significantly. The long conflict between the State's litigation arguments, on the one hand, and the public positions and policies of the State's agencies and officials, on the other, has been reduced, in the end, to a hollow plea for judicial deference. Defendants can no longer claim that there is no need for money in the New York City schools, because the State officials responsible for education have submitted compliance plans to the courts calling for billions of dollars in additional funding. And Defendants can no longer claim that the judiciary has no role in education finance because Defendants, echoing what the State's political leaders have said outside the courtroom, admit that the political branches require the Court's direction to achieve constitutional compliance. It is now time, therefore, to bring this litigation to an end by issuing a clear and enforceable order.

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[18] Under *CFE II*, the current State education funding system is unconstitutional as it affects the funding of the New York City school system. Since 2003, the Court has implicitly allowed this unconstitutional system to remain in effect, pending implementation of the remedy, in order to avoid disruption of the ongoing system. Presumably this Court will permit the State time to comply with any order the Court now issues. For the purposes of retaining jurisdiction, the Court might consider issuing an explicit stay that would permit the present system to remain in effect for 90 days pending the convening of a hearing to determine the state of compliance.

In our opening brief, we asked for certain specific relief, and we respectfully provide a slightly revised request for relief reflecting our further review and response to Defendants' brief. We respectfully request that the Court:

1) Require the State to ensure that operating funds available for the New York City public schools are increased by an amount between $4.7 billion and $5.6 billion (with inflation and enrollment adjustments) above the amounts spent in the 2004-2005 school year;

2) Require the State to ensure that the New York City Department of Education develop a comprehensive sound basic education plan as required by paragraph (f) of the Supreme Court's order by December 31, 2006, and further require the State to phase in the increase in operating funds over four years to be implemented in accordance with the plan;

3) Require the State to ensure that funds are available to implement $9.179 billion in capital improvements in accordance with the BRICKS plan and that the comprehensive sound basic education plan specify how these additional capital funds are being expended to remedy the facilities deficiencies identified in *CFE II* and to support the instructional objectives of the plan;

4) Require the State to implement the accountability measures required by paragraph (g) of the Supreme Court's order and undertake the further costing-out studies required by paragraphs (b) and (c) of the Supreme Court's order beginning no later than July 1, 2010;

5) Require the Governor to include in his February 2007 executive budget proposal specific mechanisms for accomplishing each of the above-listed requirements; and

6) Retain jurisdiction and set this matter down for a hearing 90 days from the date of issuance of the Court's determination of this appeal for the purpose of reviewing the state of compliance at that time.

Dated: New York, New York
August 15, 2006

Respectfully submitted,

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