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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,

Plaintiffs-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,

Defendants-Respondents-Cross-Appellants.

PROPOSED BRIEF OF *AMICUS CURIAE*
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
IN SUPPORT OF CAMPAIGN FOR FISCAL EQUITY, INC. *ET AL.*

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The Association of the Bar of the City of New York (the "Association") respectfully submits this brief as *amicus curiae* in support of the request of plaintiffs-appellants-respondents Campaign for Fiscal Equity, Inc. *et al.* (hereinafter collectively "CFE") that this Court issue a clear and precise order to ensure that the legislature and executive promptly remedy the constitutional deficiencies in funding for New York City's public schools.

STATEMENT OF INTEREST OF *AMICUS*

Founded in 1870, the Association is a professional organization of more than 22,000 attorneys. Through its standing committees, including its Committees on Civil Rights and Education and the Law, the Association educates the bar and the public about legal issues relating to civil rights and education, including the right of access to a sound basic education. The Association also has long had a special interest in preserving the judiciary's role in enforcing rights guaranteed by the state and federal constitutions and acting as a check against the violation of these rights by the State's political branches.

The Association believes that the fundamental right of all schoolchildren to an opportunity for a sound basic education that enables them to become meaningful participants in our society is at the core of our State's constitutional democracy. The Association, therefore, has a strong interest in supporting an effective judicial remedy that will at long last afford that opportunity to New York City's public schoolchildren, which this Court, more than three years ago, held has been denied to them by the State in violation of their constitutional rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Association supports CFE's position that this Court has the power to issue – and should issue – a clear and precise directive to the State which, among other things, would specify the dollar range of the operational funding needed to provide New York City's schoolchildren with a sound basic education. CFE's briefs make clear that the doctrine of separation of powers is no bar to the relief it requests. (*See* Opening Brief for Plaintiffs-Appellants-Respondents, dated June 6, 2006 ("CFE Br.") at 29-34; Supplemental Brief for Plaintiffs-Appellants-Respondents, dated August 15, 2006 ("CFE Supp. Br.") at 31-43.) The Court's role under that doctrine as a check on the political branches and indeed the rule of law itself are subverted when, as here, the political branches ignore the Court's directives to remedy constitutional violations and the vindication of fundamental constitutional rights are unreasonably delayed.

In the thirteen years since this litigation began, a whole generation of children passed through the New York City schools from kindergarten to twelfth grade having been denied, like generations before them, their fundamental right to the opportunity for a sound basic education. This Court, affording the political branches the deference due them, gave them thirteen months to provide the funding and other remedies needed to cure the constitutional deficiencies. Now, more than three years later, the State has not only failed to do so, but defendants have acknowledged that a legislative stalemate prevents the State from doing so.

As this Court recognized three years ago, it is of paramount importance that New York "learn from our national experience and fashion an

outcome that will address the constitutional violation instead of inviting decades of litigation." *Campaign for Fiscal Equity, Inc.* v. *State of New York*, 100 N.Y.2d 893, 931 (2003) ("*CFE II*"). With that in mind, the Court rejected defendants' argument that separation of powers concerns should restrain it from issuing the remedial order then appropriate, *id.* at 931-32, and it should do so again now.

In this brief, the Association reviews the experience in other school funding cases to make clear that the relief CFE seeks is essential to avoid further, protracted delays in providing New York City's schoolchildren the educational opportunity to which they are entitled and have long been denied. This experience also shows that the relief CFE seeks is neither unprecedented nor excessively intrusive on the political branches' policy-making functions, and that courts throughout the country have long recognized that they have the power to issue specific remedial orders – and indeed the obligation to do so, where the political branches fail to act.

We focus on the protracted litigation in New Jersey, Kansas, Tennessee, and Arkansas. The more than fifty years of combined litigation experience in these states shows that, as this Court recognized in *CFE II*, the longer courts hesitate to provide specific remedial direction when confronted by the failure of the political branches to remedy a constitutional violation, the more likely it is that students will continue to be denied their constitutional rights.

ARGUMENT

THE EXPERIENCE IN OTHER STATES IN WHICH THE POLITICAL BRANCHES HAVE FAILED TO ACT DEMONSTRATES WHY IT IS IMPERATIVE THAT THIS COURT NOW ISSUE A CLEAR, PRECISE, AND ENFORCEABLE REMEDIAL ORDER

It is the province and duty of the judiciary to say what the law is, as this Court reaffirmed in *CFE II* and as defendants acknowledge in their brief. The Court's order in *CFE II*, which gave defendants ample time and discretion to remedy the constitutional violation the Court found, demonstrated the proper respect and deference then owing to its co-equal branches. Now, however, more than three years after that order and more than two years after the State failed to meet the deadline imposed on it, it is no answer to say that policy-making by the executive and legislative branches is preferable to judicial policy-making. It undoubtedly is. But, here, the inaction of the political branches has necessitated a clear and precise remedial order to avoid the worst possible outcome – an unremedied, serious constitutional violation. Generations of New York City public school students have already been denied their constitutional rights and there is no conceivable justification for any further delays in their enforcement.

As CFE shows, the trial court properly acted to determine the amount of funding needed to remedy the constitutional violation when the State failed to do so and the trial court's adoption of the referees' determination of that amount is well supported by the record. (*E.g.*, CFE Br. at 15-22, 35; CFE Supp. Br. 13-15.) Although the Appellate Division rejected the referees' report, it nevertheless concluded that the record fully supported the conclusion that operational funding in

a range of $4.7 to 5.6 billion was needed to provide the constitutionally required education opportunity. Nevertheless, the Appellate Division's order was ambiguous, suggesting that the legislature need only "consider" this range of operational funding. *Campaign for Fiscal Equity, Inc.* v. *State*, 814 N.Y.S.2d 1, 12-13 (N.Y. App. Div. 1st Dep't 2006). The Appellate Division concluded that a more direct order compelling the State to provide funding in this range would violate the separation of powers. Defendants also argue that the Court lacks authority to order a specific remedy to the ongoing constitutional violations, at least at this stage, and instead should only provide a declaratory judgment that "defendants' plan proposes a reasonable amount of additional operating funds." (Brief for Defendants-Respondents-Cross-Appellants, dated July 10, 2006 ("Def. Br.") at 63, 66.)

Neither of these approaches is consistent with this Court's role in ensuring that the political branches comply with the constitution and protecting rights guaranteed by the constitution; they would only undermine respect for the judicial process. As Justice Saxe noted in his dissent:

> The [Appellate Division] majority's "direction," at this juncture, leaves the students of the New York City public schools without any more of a remedy for this substantial constitutional violation than they had on July 31, 2004, the day noncompliance with the Court of Appeals' prior directive was clear. I am unable to read the majority's decretal paragraph as containing the type of clear and exact directive that, if ignored, may be the subject of enforcement proceedings. Without that type of clarity, it merely amounts to a suggestion to consider taking action, an illusory and possibly unenforceable remedy.

Campaign for Fiscal Equity, 814 N.Y.S.2d at 14.

Similarly, defendants' assertion that this Court is powerless to order the funding required to remedy the constitutional violation and can do no more than declare an amount it considers appropriate and hope that the Court's "moral authority and legitimacy" will "spur the elected branches to take action," (Def. Br. at 62), also would render meaningless this Court's established role in interpreting and enforcing the constitution.[1] Paradoxically, defendants' assertion that the Court merely exercise its "moral authority" but not issue a specific, enforceable order, and the Appellate Division's conclusion that it can only direct the State to "consider" the funding found necessary to remedy the constitutional violation, are in essence proposals for an advisory opinion, which *would* be improper. *See Saratoga County Chamber of Commerce, Inc.* v. *Pataki*, 100 N.Y.2d 801, 810-11 (2003).

Moreover, even defendants seem to recognize that at some stage the Court may have to issue a specific, enforceable order. (Def. Br. at 66.) But their suggestion that this Court should tolerate further delay in the hope that perhaps the State will live up to its constitutional obligations cruelly ignores the fact that New York City's schoolchildren have already too-long been denied their constitutional

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[1] Moreover, the defendants' assertion that the Court should "declare" defendants' proposed $1.93 billion dollars as the appropriate amount to remedy the constitutional deficiency only illustrates further resistance to this Court's direction in *CFE II*, for as CFE shows there is no record support for this amount whatsoever, and it even conflicts with the position taken by defendants before the referees. (CFE Supp. Br. at 3-6, 19-27.)

rights and would unjustifiably condemn further generations of children to a similar fate.

At this late juncture, and after the State's undisputed failure to comply with the Court's previous remedial order, anything less than a precise, enforceable order can only serve to add years to this litigation. We therefore strongly endorse Justice Saxe's conclusion below: "Under the circumstances, no further deference is appropriate." *Campaign for Fiscal Equity,* 814 N.Y.S.2d at 17 (Saxe, J., dissenting).

It is against this background that the Association offers a discussion of the experience of other states in similar litigation, which provides object lessons of the propriety and need to provide the relief requested by CFE if further delay and more litigation is to be avoided.

The Association has selected the experiences of four states – New Jersey, Kansas, Tennessee, and Arkansas – that are particularly instructive. In the states examined, the courts initially declined to order specific remedies and, as here, gave the political branches an opportunity to remedy the constitutional deficiencies. Thereafter, compliance was achieved only by the issuance of firm and specific orders. Most importantly, the longer the court delayed in issuing specific orders, the more protracted the litigation became. Examination of the litigation in these states demonstrates that the only way this Court is likely to avoid the protracted litigation and delays experienced in other states is to now order the

legislature to enact legislation providing the specific funding needed to meet the constitutional requirement.[2]

A. New Jersey

This Court is already aware of the cautionary lesson taught by New Jersey's experience. In issuing what it then hoped was a sufficiently specific order in *CFE II*, this Court observed:

> [T]he remedy is hardly extraordinary or unprecedented. It is, rather, an effort to learn from our national experience and fashion an outcome that will address the constitutional violation instead of inviting decades of litigation. A case in point is the experience of our neighbor, the New Jersey Supreme Court, which in its landmark education decision 30 years ago simply specified the constitutional deficiencies, beginning more than a dozen trips to the court, a process that led over time to more focused directives by that court.

100 N.Y.2d at 931-32 (citations omitted). We review the experience of New Jersey in greater detail because it so dramatically illustrates why further delay in issuing a specific, enforceable order at this stage threatens to result in the protracted litigation that this Court so properly sought to avoid.

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[2] As CFE shows (*see* CFE Supp. Br. at 39-41), defendants incorrectly argue that the funding litigation in Massachusetts and North Carolina serve as reminders of the "need for judicial restraint" by this Court. The Massachusetts Supreme Judicial Court terminated its jurisdiction because the commonwealth, immediately after the decision finding the funding system unconstitutional in *McDuffy* v. *Secretary of Education*, 415 Mass. 545, 615 N.E.2d 516 (1993), enacted legislation that substantially remedied the constitutional deficiencies. *See Hancock* v. *Comm'r of Educ.*, 443 Mass. 428, 432, 822 N.E.2d 1134, 1137-38 (2005). The North Carolina Supreme Court deferred in the first instance, like this Court in *CFE II*, but indicated it would take more specific action if the state did not enact remedial legislation in response to its order. *See Hoke County Bd. of Educ.* v. *State of North Carolina*, 358 N.C. 605, 642-43, 649, 599 S.E.2d 365, 393, 397 (2004).

1. History of the Litigation

In 1973, the New Jersey Supreme Court held that the state's education funding mechanism violated the education article of the state constitution in *Robinson* v. *Cahill*, 62 N.J. 473, 303 A.2d 273 ("*Robinson I*"). The state passed remedial legislation in 1975, which the court found facially constitutional. *Robinson* v. *Cahill*, 69 N.J. 449, 355 A.2d 129 (Jan. 30, 1976) ("*Robinson V*"). However, the court retained jurisdiction and ordered that unless the state provided funding for the reforms by April 1976, it would issue an order to show cause why specific relief should not be mandated. *Id.* at 468, 355 A.2d at 139.

When the legislature failed to fund the reforms it enacted in response to *Robinson I*, the New Jersey Supreme Court enjoined state and local officials from expending *any* funds for the support of the state's public schools on the ground that "[t]he continuation of the existing unconstitutional system of financing the schools into yet another school year cannot be tolerated." *Robinson* v. *Cahill*, 70 N.J. 155, 159, 358 A.2d 457, 459 (May 13, 1976) ("*Robinson VI*"). This is the most drastic action taken by a court to ensure legislative compliance in state education funding litigation. The court justified the coercive nature of its order by citing Watergate special prosecutor Archibald Cox for the proposition that "[n]ot to act would be to recognize judicial futility," and concluding that injunctive relief "can hardly be thought of as the product of unwarranted judicial 'activism' in light of the history of this litigation." *Id.* at 160 n.1, 358 A.2d at 459 n.1. The court dissolved the injunction, ending an eight-day shutdown of the public schools, after

the state enacted a statewide income tax to ensure adequate funding for education. *Robinson* v. *Cahill*, 70 N.J. 465, 360 A.2d 400 (July 9, 1976) ("*Robinson VIII*").

In 1981, plaintiffs from the state's poorest, special-needs districts filed a new challenge to the 1975 legislation, arguing that the financial disparities between districts that persisted even after the law had been funded rendered it unconstitutional. On the first appeal, the New Jersey Supreme Court affirmed the trial court's decision that plaintiffs' claims should be decided at the administrative level in the first instance, remanded to the commissioner of education for further proceedings, and relinquished jurisdiction. *Abbott* v. *Burke*, 100 N.J. 269, 301-03, 495 A.2d 376, 393-94 (1985) ("*Abbott I*") (recounting history of the litigation). Five years later, in 1990, the court approved the holding of the administrative law judge and ordered the state to amend the 1975 law to ensure substantial funding equality and to provide certain special programs and services in the special-needs districts. *Abbott* v. *Burke*, 119 N.J. 287, 384-85, 575 A.2d 359, 408 (1990) ("*Abbott II*"). The court in *Abbott II* found that the partial reforms enacted by the political branches following *Abbott I* did not fully remedy the constitutional violations, remarking that despite the "many achievements" of the state board of education and education commissioner, the state's program was still constitutionally deficient. *Id.* at 296, 575 A.2d at 363. The court thus imposed a fairly specific order, ordering the state to remedy the ongoing constitutional violation by ensuring that special needs districts would have a budget per pupil that "approximates the average net current expense budget" of specific richer suburban

districts and that was "sufficient to address [the poor districts'] special needs." *Id.* at 386-88, 575 A.2d at 408-09.

Nonetheless, the legislature responded with another partial remedy that was again found to be unconstitutional because, despite allocating $700 million in extra funding to the poorer districts, it failed to guarantee sufficient funds to such districts to enable them to achieve parity with wealthy districts. *Abbott* v. *Burke*, 136 N.J. 444, 447, 454-55, 643 A.2d 575, 576, 580 (1994) ("*Abbott III*"). The court's response was simply an exhortation to the state to act: "It is the State and only the State that is responsible for this educational disparity, and only the State can correct it. Through its laws, a system of education exists that is not thorough and efficient for these students in the special needs districts. The State must remedy that failing." *Id.* at 454, 643 A.2d at 580.

In 1996, the legislature passed additional legislation, which the court, the next year, again found unconstitutional as applied to the special-needs districts because it did not achieve substantial equality in per-pupil expenditures. *Abbott* v. *Burke*, 149 N.J. 145, 153, 693 A.2d 417, 421 (1997) ("*Abbott IV*"). The court determined at this time that a "wait and see" approach was "no longer an option":

> It is against that backdrop, and the inescapable reality of a continuing profound constitutional deprivation that has penalized generations of children, that one must evaluate an alternative, "wait and see" approach. That approach usually is both prudent and preferred in constitutional jurisprudence, and the Court has taken that approach in the past. *E.g.*, *Abbott III*, *supra*, 136 N.J. 444, 643 A.2d 575; *Abbott II*, *supra*, 119 N.J. 287, 575 A.2d 359; *Abbott I*, *supra*, 100 N.J. 269, 495 A.2d 376; *Robinson I*, *supra*, 69 N.J. 449, 355 A.2d 129. In light of the

> constitutional rights at stake, the persistence and depth of the constitutional deprivation, and in the absence of any real prospect for genuine educational improvement in the most needy districts, that approach is no longer an option.

Id. at 201-02, 693 A.2d at 445. The court thus mandated that the legislature pass interim funding for the coming school year that would "assure parity in per pupil expenditures" between special needs districts and more affluent districts. *Id.* at 189, 693 A.2d at 439. It further ordered the state to address special education needs "by determining and implementing those supplemental programs essential to relieve students in the special needs districts of their unique disadvantages." *Id.* at 190, 693 A.2d at 439. It remanded to the trial court to direct the state to initiate a study and to prepare a report "with specific findings and recommendations" to ensure that all students received a constitutionally adequate education. *Id.* at 199-200, 693 A.2d at 444.

The following year, the court affirmed the trial court's report mandating pre-kindergarten programs, summer school, whole school reform, and school-based health and social services, and in fact added more supplemental programs to the list. *Abbott* v. *Burke*, 153 N.J. 480, 489, 527-28, 710 A.2d 450, 454, 473-74 (1998) ("*Abbott V*"). Litigation since then has focused on clarifying the mandate of *Abbott V* and on satisfactory implementation of the court's order. *See, e.g.*, *Abbott* v. *Burke*, 164 N.J. 84, 90, 751 A.2d 1032, 1035 (2000) (clarifying that *Abbott V* requires the state to fund all costs of facilities remediation and construction); *Abbott* v. *Burke*, No. 42,170, 2006 N.J. LEXIS 655, at *3 (May 22, 2006) (ordering the state, *inter alia*, to fund "opening expenses for all new and

renovated facilities that come 'online' in FY 2007"). The court's involvement with education funding continues.

2. Lessons Taught By New Jersey's Experience

The history of the New Jersey litigation demonstrates that once it becomes clear that the political branches are not complying with constitutional directives, specific, enforceable orders, including orders mandating the expenditure of specific sums of money and even specific educational programs, are not only appropriate but necessary to protect the constitutional rights at stake. General, even good faith efforts that fall well short of constitutional compliance are not enough. In the *Abbott* series of cases, the court repeatedly articulated general constitutional standards, but the political branches began to provide equal funding only in response to the decision in *Abbott V* ordering the enactment of a series of specific reforms. It took the New Jersey court many years before it recognized that a "wait and see" approach did not work. The New Jersey experience thus should continue to be a cautionary tale for this Court.[3]

In *CFE II*, this Court entered an order that went beyond indicating a constitutional deficiency and was reasonably specific. This Court expressed the hope that its order would be sufficient and would not encounter "sustained legislative resistance." 100 N.Y.2d at 932. Sadly, more than three years later, this

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[3] The Association notes, however, that the order CFE proposes here is substantially less intrusive than the New Jersey order that mandated specific educational programs. As CFE emphasizes, its order leaves to the discretion of the political branches a number of choices, including the allocation of the required funding between the State and New York City. (CFE Supp. Br. at 49.)

hope has not been fulfilled. Accordingly, this Court should now provide an even more specific remedy for the ongoing constitutional violations – in the form urged by CFE – to avoid New Jersey's experience.

B. Kansas

The experience of educational litigation in Kansas illustrates not only the importance of specific, enforceable orders – in that case the precise amount of funding needed to satisfy the constitution – but, if necessary, the effectiveness of a coercive threat in the face of the refusal by the political branches to implement constitutionally adequate reforms.

1. History of the Litigation

The educational funding system in Kansas was first challenged in 1999. A state district court initially granted summary judgment to the state *sua sponte*, a decision that was reversed by the Kansas Supreme Court in *Montoy* v. *State*, 275 Kan. 145, 62 P.3d 228 (2003) ("*Montoy I*"). On remand, the district court held after trial that the state's school-funding mechanism violated the education article of the state constitution and equal protection clauses of the federal and state constitutions. *Montoy* v. *State*, No. 99 Civ. 1738, 2003 WL 22902963, at *49 (Kan. Dist. Ct. Dec. 2, 2003). The court stayed entry of final judgment for one year to give the legislature time to craft a remedial bill. *Id.* at *50. Rather than do this, the legislature "openly declared their defiance of the Court and refused to meaningfully address the many constitutional violations within the present funding scheme." *Montoy* v. *State*, No. 99 Civ. 1738, 2004 WL 1094555, at *5 (Kan. Dist. Ct. May 11, 2004). After the year passed, the district court declared the state's

education funding statutes void and issued a detailed order specifying eight minimum elements of a constitutional funding scheme, setting forth certain features the scheme could *not* contain, and emphasizing the requirement that the scheme reflect the actual costs of providing adequate funding. *Id.* at *11-13. The court enjoined the distribution of funds for public education under the unconstitutional system. *Id.* at *11. The state appealed and obtained a stay of the district court's order.[4]

The Kansas Supreme Court upheld the finding that the funding scheme violated the state constitution's education article, but retained jurisdiction and postponed consideration of a final remedy for four months to give the legislature time to find a remedy in the current session. *Montoy* v. *State*, 278 Kan. 769, 775-76, 102 P.3d 1160, 1164-65 (Jan. 3, 2005) ("*Montoy II*"). Before the deadline passed, the legislature authorized $142 million in additional funding for the coming school year and ordered a cost study to be performed by the state's audit agency. The court found that the increase in funding was not adequate to bring the state into compliance with the education article. *Montoy* v. *State*, 279 Kan. 817, 818, 112 P.3d 923, 925 (2005) ("*Montoy III*"). Accordingly, the court gave the legislature one month to implement a specified minimum increase in funding of $285 million, which was based on a 2002 cost study (the only such

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[4] *See* John Hanna, "Supreme Court Blocks Lower Court Order Closing Schools," Associated Press, May 19, 2004, *available at* http://www.kctv5.com/Global/story.asp?S=1880299 (last visited on August 29, 2006).

study in the record). *Id.* at 845-46, 112 P.2d at 940-41. The court defended the legitimacy of issuing a coercive remedial order:

> [W]e do not quarrel with the legislature's authority. We simply recognize that the final decision as to the constitutionality of legislation rests exclusively with the courts. Although the balance of power may be delicate, ever since *Marbury* v. *Madison* it has been settled that the judiciary's sworn duty includes judicial review of legislation for constitutional infirmity. We are not at liberty to abdicate our own constitutional duty.

Id. at 826, 112 P.3d at 929-30 (citations omitted). The court further observed that "judicial monitoring in the remedial phase can help check political process defects and ensure that meaningful relief effectuates the court's decision." *Id.* at 828, 112 P.3d at 931 (citations omitted). The court acknowledged the "initial attractiveness" of the argument that the legislature's reforms should have been accepted as an interim step toward a full remedy, but found that this attractiveness "pales in light of the compelling arguments of immediate need made by the plaintiffs and *amici curiae*." *Id.* at 844, 112 P.2d at 940. These arguments, the court found, "remind us that we cannot continue to ask current Kansas students to 'be patient.' The time for their education is now." *Id.* at 844-45, 112 P.2d at 940.[5]

The legislature failed to act by the deadline, July 2, 2005. The same day, the court issued an order requiring the state to show cause why the court should not enjoin expenditure of school funds pending compliance with its orders

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[5] *See also Campaign for Fiscal Equity*, 814 N.Y.S.2d at 21 (noting that "active remediation by [the] judiciary [is] appropriate 'as long as such power is exercised only after legislative noncompliance'") (quoting *Montoy III*, 279 Kan. at 828, 845-46, 112 P.3d at 931, 940-41) (Saxe, J., dissenting).

and effectively shut down the Kansas public schools. *See Montoy* v. *State*, No. 92,032, 2006 Kan. LEXIS 479, at *11-12 (July 28, 2006) ("*Montoy IV*") (discussing history of the litigation).

Four days later, the legislature passed interim funding, allocating an additional $147 million over the $142 million found inadequate in *Montoy III*. *Id.* at *12. All parties agreed that this complied with the order in *Montoy III* for a minimum increase in funding, and, on July 8, 2005, the court approved the interim finance formula, which averted the need for the shutdown, but retained jurisdiction to review subsequent, permanent legislation. *Id.* at *13-14. In May 2006, the legislature passed additional funding legislation after the cost study was complete. *Id.* at *14. The Kansas Supreme Court has now concluded that the state has finally complied with its constitutional obligations and has ended the litigation *Id.* at *33.

2. Lessons Taught By Kansas's Experience

The experience in Kansas demonstrates how specific orders can lay the basis for promptly overcoming inaction by the political branches. Only six months elapsed between the Kansas Supreme Court's finding that the educational funding scheme was unconstitutional and its specific order requiring funding in a specific amount. A little more than a month later, the state enacted legislation providing the funding specified by the court. The first order to undertake specific reforms, issued in June 2005 in which the court ordered the legislature to increase school funding by $285 million, was itself not sufficient to get the legislature to act, but it laid the basis for the court's subsequent threat the following month to

enjoin spending on education under the unconstitutional system. This threat resulted in prompt compliance.

Although the New York litigation has not yet reached the stage where it is necessary to threaten to enjoin any expenditure on education, the availability of this option demonstrates the appeal of the remedy sought by CFE, which sets specific ranges for the funding required. This specific directive should break the legislative stalemate and avoid the need for this Court to invoke the more coercive measures – and potential constitutional crisis – threatened by the Kansas court. Though the Kansas litigation almost reached an extreme stage, by directing the legislature to promote a specific amount and imposing tight deadlines – four months, then one month – the court was able to retain a strong and ultimately successful hand in directing the state to comply with its orders. As in Kansas, there is no longer any justification for asking New York City's students to "'be patient.' The time for their education is now."

C. Tennessee

Tennessee's eighteen-year school funding litigation is another example of undue deference resulting in needlessly protracted litigation.

1. History of the Litigation

Tennessee's educational funding system was first challenged in 1988. After a six-week trial in 1990, the chancery court ruled in favor of the plaintiffs, entering a declaratory judgment that the state's education funding scheme violated the equal protection clause and education article of the state constitution, but left the fashioning of a remedy to the legislature. In 1993, the Tennessee Supreme

Court affirmed, finding that there was no rational basis for "the disparities in educational opportunities" between wealthy and poorer school districts that resulted from the state's statutory funding system. *Tenn. Small Sch. Sys.* v. *McWherter*, 851 S.W.2d 139, 156-57 (Tenn. 1993) ("*Small Schools I*").[6] The court made clear, however, that "[t]he essential issues in this case are quality and equality of education. . . not, as insisted by the defendants . . . , equality of funding." *Id.* at 156. The court agreed that the appropriate remedy was, "within constitutional limits, a legislative prerogative," and thus remanded for "such other proceedings that may be necessary." *Id.* at 156-57.

In response to the court's decision in *Small Schools I*, the legislature introduced a new school financing formula in which poor counties would receive more state funding to ensure a substantially equal educational opportunity for all students. As the Tennessee Supreme Court subsequently found, however, "[t]he costs of teachers' compensation and benefits . . . [,] the major item in every education budget," was omitted from the new equalization formula. *Tenn. Small Sch. Sys.* v. *McWherter*, 894 S.W.2d 734, 738 (Tenn. 1995) ("*Small Schools II*"). The court held that the exclusion of teacher salary increases from this formula rendered the plan unconstitutional. *Id.* Nonetheless, the court again declined to articulate a specific remedy, finding simply that "[t]he source of funding for the plan addresses the discretion of the legislature," and again remanded "for such proceedings as may be appropriate." *Id.* at 739.

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[6] The court noted that "the extent, if any, to which the system does not comport with the education clause need not be determined at this time. 851 S.W.2d. at 152.

In 1995, in response to *Small Schools II*, the state enacted legislation that equalized teachers' salaries in the lowest-paying school districts on a one-time basis, but did not include teachers' salaries as a component of the funding formula created in response to *Small Schools I*. When the case returned to the Tennessee Supreme Court seven years later, the court reversed the trial court's finding that state had met its constitutional obligations, finding that there is "no rational basis . . . for structuring a basic education funding system consisting entirely of cost-driven components [except for teacher salaries]." *Tenn. Small Sch. Sys.* v. *McWherter*, 91 S.W.3d 232, 243 (Tenn. 2002) ("*Small Schools III*"). Remarkably, although the court said that it "recognized this fact seven years ago in *Small Schools II*, and we strongly reiterate it again today," the court again made no specific order and simply "remanded for such further proceedings as may be appropriate." *Id.* at 240, 243.

The political branches enacted further legislation in 2005 amending the funding formula to include teachers' salaries. In June 2006 the trial court found that there were no further issues pending in the case and dismissed it.[7]

2. Lessons Taught By Tennessee's Experience

In Tennessee, the court held the state to a precise standard in requiring that teacher salaries be equalized, but it never ordered the state to undertake specific reforms that would comply with this standard. This hesitation greatly

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[7] *See* Rose French, "Judge dismisses 18-year-old small schools lawsuit against the state," Associated Press, June 9, 2006, *available at* http://www.tfponline.com/absolutenm/templates/breaking.aspx?articleid=1821&zoneid=41 (last visited on August 29, 2006).

prolonged the litigation. Indeed, in *Small Schools III*, the court recognized that its prior decision did not "specifically address whether the legislature could devise another way of addressing the issue of teachers' salaries besides making salaries a component of the [statutory funding formula], although that continues to seem to us to be the simplest and most effective way of solving the problem." 91 S.W.3d at 241 n.15. It, however, attributed its decision not to direct this specific means of accomplishing the required result to its belief that "the means whereby the state could achieve its constitutional obligation to provide substantially equal educational opportunities is a legislative prerogative and . . . the legislature's power in this regard is extensive." *Id.* As a result, it took [nine] additional years before the legislature finally included teachers' salaries as a component of the statutory funding formula. Once again, it is the schoolchildren of Tennessee who have been penalized by the court's undue deference.

D. Arkansas

The Arkansas Supreme Court has repeatedly ruled that various school financing schemes proposed by the state legislature were unconstitutional but, though the litigation is now in its second decade, has never issued a specific remedial order. As a result, the public schoolchildren of Arkansas have been deprived of their rights for more than a decade – and this saga may not be over.

1. History of the Litigation

In 1994, an Arkansas chancery court held that the state's education funding system, which relied heavily on local property taxes, was unconstitutional under the education article and equal protection clause of the state constitution.

See Tucker v. *Lake View Sch. Dist. No. 25*, 323 Ark. 693, 695, 917 S.W.2d 530, 532 (1996) ("*Lake View I*") (discussing background of litigation; dismissing appeal on ground that chancery court's order was not final). The chancery court "stayed the effect" of its decision for two years to give the state time to implement a constitutional funding system in conformity with its opinion, and "declined to grant [plaintiffs] any of the specific remedies requested." *Id.*

Subsequently, the state enacted legislation changing the education funding formula, and the case was transferred to a new chancery court judge, who dismissed the suit for failure to state a claim on the ground that the new legislation was presumed to be constitutional based solely on the fact that it was enacted in response to the chancery court's 1994 order. The Arkansas Supreme Court reversed, holding that a trial was necessary to determine whether the new state funding formula in fact complied with the 1994 order. *Lake View Sch. Dist. No. 25* v. *Huckabee*, 340 Ark. 481, 493-95, 10 S.W.3d 892, 899-900 (2000) ("*Lake View II*") ("It would take an extraordinary leap of faith to assume that the mere passage of a new school funding formula resolves all issues relating to disparities in the school funding system set out in the 1994 Order.").

After trial, the chancery court concluded that the school funding system was still unconstitutional, and the Arkansas Supreme Court affirmed, but it also upheld the chancery court's refusal to issue an order directing the state to take specific steps to reform the system and did not itself issue a more specific remedial order. *Lake View Sch. Dist. No. 25* v. *Huckabee*, 351 Ark. 31, 98, 91 S.W.3d 472, 511 (2002) ("*Lake View III*"). The court stayed the issuance of its mandate for

thirteen months to give the state time to institute further equalization measures. *Id.* at 97, 91 S.W.3d at 511. At the end of the thirteen months, the court appointed a panel of special masters "to examine and evaluate legislative and executive action" taken during that time and make findings as to whether the state had complied with its order in *Lake View III*. *Lake View Sch. Dist. No. 25* v. *Huckabee*, 356 Ark. 1, 2, 144 S.W.3d 741, 742 (2004).

After reviewing the masters' report, the court concluded that, although there were lingering deficiencies, it was sufficiently satisfied by the reform measures and, as it did not think "the General Assembly might renege or backtrack on school measures already passed," relinquished jurisdiction over the case. *Lake View Sch. Dist. No. 25* v. *Huckabee*, 189 S.W.3d 1, 16-17 (Ark. 2004) ("*Lake View IV*"). However, just one year later, the court granted plaintiffs' motion to recall its mandate, reappoint the masters, and "order the State Defendants [including the governor and legislative leaders] to show cause why they should not be held in civil contempt for failure to comply with this Court's previous orders." *Lake View Sch. Dist. No. 25* v. *Huckabee*, No. 01-836, 2005 Ark. LEXIS 776, at *1 (Ark. Dec. 15, 2005) ("*Lake View V*") (recounting prior, unpublished order).

The masters thereafter reported that the legislature had failed to comply with the statutory requirements it had itself enacted to establish an adequate education and to provide appropriate funds for such an education. *Id.* at *17-20. In particular, the masters found that "there was 'no evidence that the General Assembly attempted to comply with Act 57,'" which imposed a duty on the legislature to annually review and report on the adequacy of the funding levels,

and that "the State has not lived up to its promise to make education the State's first priority" as required by Act 108. *Id.* at *17-19.

The Arkansas Supreme Court upheld the masters' report:

> [W]e hold that the General Assembly failed to comply with Act 57 and Act 108 in the 2005 regular session and, by doing so, retreated from its prior actions to comply with this court's directives in [*Lake View III*]. We further hold that the General Assembly could not have provided adequate funding for the 2005-2006 and 2006-2007 school years as it made no effort to comply with Act 57 and to determine what adequate funding should be.

Id. at *31.

Though the court "h[e]ld that our public schools are operating under a constitutional infirmity which must be corrected *immediately*," *id.* at *33 (emphasis added), it gave the state nearly another twelve months – until December 1, 2006 – to correct the remaining constitutional deficiencies for no reason other than that "[w]e have held in the past that the General Assembly and Department of Education should have time to cure the deficiencies, and we do so again," *id.* at *33. Indeed, it was left to a concurring justice to make explicit that the court would enforce its order with coercive measures if necessary: "[I]f compliance is not achieved, this court . . . is provided a means to enforce these matters so that compliance may be attained." *Id.* at *34 (Glaze, J., concurring).

While the state enacted additional legislation earlier this year in response to *Lake View V*, it is not yet known whether the Arkansas Supreme Court will find this remedy adequate.

2. Lessons Taught By Arkansas's Experience

Arkansas is a dramatic example of the consequences of a failure to issue specific remedial orders. The legislature – when it has acted in good faith – has attempted to pass reforms it perceives to be constitutionally adequate, but these have repeatedly been found by the court to be unconstitutional. Yet the Arkansas Supreme Court has never been willing to take the next step and specifically order a funding scheme that it considers constitutionally adequate. Twelve years after the state's funding scheme was first held unconstitutional, it is still unknown whether the state has met it constitutional obligations. Meanwhile, the public school children of Arkansas are paying the price for the court's hesitation.

CONCLUSION

These four sister-state litigations offer a clear lesson: in the first instance, deference to the political branches to enact legislation providing the funding needed for a constitutionally adequate education is appropriate. But once the legislature and executive fail to use this opportunity to remedy the constitutional deficiency, the court should give explicit and specific direction as to precisely what is required to meet the constitutional requirement. Failure to do so promptly after the state defaults on its obligation to remedy the constitutional deficiency is determined by the court, as the New Jersey, Tennessee, and Arkansas experiences show, results in protracted litigation and unconscionable delays in vindicating the rights of public schoolchildren. The New Jersey court, for example, eventually recognized that to obtain compliance firm and specific orders were needed, but only after decades of litigation. By contrast, the Kansas court

showed that once the legislature fails to take advantage of the initial opportunity to provide the constitutionally required remedy, the most effective way to avoid further litigation and delay is for the court to specify precisely what legislation is needed to remedy the constitutional violation. Any further legislative resistance thereafter may be met, as the Kansas court showed, by additional coercive measures. But it is to be hoped that will be unnecessary here once this Court enters an order providing the specific relief requested by CFE.

The assertion that this Court lacks the power to order such relief and must simply tolerate continued non-compliance with the State's obligations to New York City's public school children reflects a fundamental misunderstanding of this Court's role in our system of separation of powers and checks and balances, and conflicts with the principle, fundamental to the rule of law, that once the Court says what the law is, the political branches have an enforceable obligation to comply.

The Association, therefore, urges the Court to grant the relief requested by CFE so that the public schoolchildren of New York City can be afforded without further delay the opportunity for a sound basic education they have until now been so unjustifiably denied.

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