



**SUPPORT FOR ENACTMENT OF THE
SHARED HELP ASSESSMENT TO REBUILD
EDUCATION (“SHARE”) ACT
IN ORDER TO HELP FUND PUBLIC
EDUCATION IN NEW YORK STATE**

EDUCATION AND THE LAW COMMITTEE

REISSUED MARCH 2021

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NEW YORK
CITY BAR

**REPORT ON LEGISLATION BY THE
EDUCATION AND THE LAW COMMITTEE**

**A.6648
S.3215**

**M. of A. Glick
Sen. Mayer**

AN ACT to amend the tax law, in relation to extending the top state income tax rate; to amend the state finance law, in relation to providing additional funding for the general support of public schools; and to amend the state finance law, in relation to creating the supplemental public higher education fund

Shared Help Assessment to Rebuild Education (“SHARE”) Act

THIS BILL IS APPROVED

I. EXECUTIVE SUMMARY

On behalf of the New York City Bar Association (the City Bar), we write this report in support of the proposed Shared Help Assessment to Rebuild Education (SHARE) Act, which would implement a temporary (two year) personal income tax increase on New York residents earning more than \$5,000,000 annually and dedicate the revenue to public education (through the New York State lottery fund) and higher education (through a separate, new fund set up to support SUNY and CUNY operations), based on the following:

- We support the SHARE Act because we believe that the current need for greatly increased public education funding, while longstanding and clear, has been terribly exacerbated by the COVID-19 pandemic; the provisions of the Act are proper and legal; and, from a policy perspective, the benefits appear to outweigh the burdens imposed, and such burdens do not seem unjust.
- We base our support for the SHARE Act not on its precise language but rather, on its general concept and approach. As such, our support for the concept of increasing personal income taxes on those earning more than \$5,000,000 annually and dedicating the revenue to public education may extend to revisions to this legislation as part of the budget process and to other legislation proposed as well. We understand that the legislative process often requires compromise. But overall, the bill is well tailored to address a compelling and urgent need.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

- We agree the SHARE Act’s tax increase should apply retroactively to tax years 2020 and 2021. An examination of case law reveals that the limited retroactivity of the SHARE Act would find support in the law, particularly in view of the important public purpose of providing necessary funding to public school students in New York due to the pandemic. Alternatively, it would also be acceptable to us to make the SHARE Act’s application prospective.
- We include a few recommendations for how certain provisions in the bill might be improved for clarity (specifying more clearly to which tax years it would not apply) and efficacy (suggesting strategic mechanisms to ensure the additional revenues will be used as intended for public education, and that equitable considerations be considered in how the money is spent).
- We agree that the SHARE Act as part of a policy of increased funding will help to solve the current education crisis. The Act proposes a fair step toward a solution because it is limited in scope and because cuts to education spending and burdens of the COVID-19 pandemic have been borne unequally and disproportionately by New York’s low-income and communities of color. The SHARE Act will distribute these burdens more equitably by delivering more revenue directly to funds in support of public education, particularly during a crisis that has created a “digital divide” which, if not addressed, will have lasting negative impacts on under-resourced districts and students.

II. BACKGROUND AND RESERVATIONS

The City Bar has a keen interest in ensuring that New York State provides the constitutionally mandated “sound basic education” to all New York school children.¹ A “sound basic education” cannot work without adequate funding – especially in facing the challenges and setbacks of the novel coronavirus (COVID-19) pandemic which began in March 2020.

The SHARE Act (A.6648/S.3215) would implement a temporary personal income tax increase on those New York residents earning more than \$5,000,000 annually, applicable only to tax years 2020 and 2021.² Specifically, the SHARE Act would introduce a new, highest tax

¹ In 1993, the Campaign for Fiscal Equity (CFE) filed a constitutional challenge to the New York State school funding system. The New York State Court of Appeals (New York’s highest court) ruled in 1995 that the New York State Constitution’s requirement (Art. XI, Sec. 1) that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated,” means the state must offer all children the opportunity for a “sound basic education,” defined as a meaningful high school education that prepares students for competitive employment and civic participation. In 2003, CFE filed and won the landmark *CFE v. State of New York* lawsuit, which successfully argued that the state’s school finance system under-funded New York City public schools and denied its students their constitutional right. *Campaign for Fiscal Equity v State of New York*, 100 N.Y.2d 893 (2003). In 2006, the Court of Appeals reaffirmed that decision. *Campaign for Fiscal Equity, Inc. v State of New York*, 8 N.Y.3d 14 (2006). (The City Bar filed an amicus brief in the 2006 *CFE* case; see <https://www.nycbar.org/pdf/report/AmicusBrief.pdf>.) Yet to this day, most of the funding needed to remedy the situation – in the billions of dollars – has not been provided, despite prior commitments by the Legislature to do so.

² The SHARE Act was first introduced on May 12, 2020 by Senators Shelley B. Mayer, who is Chair of the Senate’s Education Committee, and Toby A. Stavisky, who is Chair of the Senate’s Higher Education Committee, as S.8329; Assembly Member Deborah J. Glick, Chair of the Assembly’s Higher Education Committee, introduced the Assembly version (A.10450) on May 18, 2020. The current bill’s text is the same as what was introduced last year.

bracket, which would be a higher personal income tax rate for earners of more than \$5,000,000 per year. Their tax rate, instead of being the current top state income tax rate of 8.82 percent, would be 10.90 percent for the two-year period. The new tax rate would apply to earners of more than \$5,000,000 who are married filing jointly, a surviving spouse, a head of household, married filing separately, or unmarried. The language of the Act provides that the additional tax revenue resulting from such increase would be dedicated to public education: 85 percent would go to Kindergarten through 12th grade (K-12), and the remaining 15 percent would go to public higher education (the City University of New York (CUNY) and State University of New York (SUNY) systems).³

We set forth below our analysis of the SHARE Act from both a legal and a policy perspective. We understand that details and language of the SHARE Act may be modified or combined with other legislative proposals as part of the budget negotiation process. We hope that a bill in the spirit of the SHARE Act will be passed promptly to address the urgent funding crisis facing New York’s public school system at all levels.

III. ANALYSIS

A. The Need to Address the Public Education Funding Crisis

Over the past eleven months, as the coronavirus pandemic has raged out of control across the country and continued to disrupt public schooling across New York State, with a devastating impact on New York City schools, the City Bar’s Education and the Law Committee has watched the debate surrounding how to address the resultant budget crisis in many states, including New York.

Public school funding in New York (particularly New York City) was already chronically low before COVID-19 compared to where New York’s courts ruled 14 years ago it must be.⁴ Public schools continue to be significantly underfinanced due in large part to a failure of New York State to pay large portions of “Foundation Aid” as the legislature had committed to do. The public school system is now facing an even more extreme shortfall as a result of the projected budget deficit and threatened significant state cuts to public education due to the COVID-19 crisis. There is a need for a significant increase in revenue from New York State to address this issue since any federal assistance provided will not be sufficient to address it. As the New York State Educational Conference Board explains in a recent fact sheet:

While overall support for schools in the enacted 2020-21 state budget was flat, this was only because a \$1.1 billion state aid

The bill information is available at <https://www.nysenate.gov/legislation/bills/2021/s3215>.

³ The basis for this 85% / 15% distribution is not disclosed in the justification attached to the SHARE Act. We presume the basic skew of this distribution is due to the public school (K-12) system being a much larger system (more students, staff, people directly affected, and more of a fundamental -- indeed, constitutional -- right involved) in most every respect than the SUNY and CUNY systems, and therefore it would need more of the revenues resulting from the SHARE Act.

⁴ See the *CFE* cases, *supra* note 1.

reduction, called the “Pandemic Adjustment,” was entirely covered by federal CARES Act [5] funding received by New York State. But these federal funds are required to be shared with nonpublic schools and thus did not fully restore the reduction in state aid. The federal money was intended to help schools cover costs associated with COVID-19. The Pandemic Adjustment represents a share of existing education funding that is no longer covered by the state. Further, because the federal funding is one-time revenue, there is now a \$1.1 billion hole in state education funding to be filled in the coming state budget. The Pandemic Adjustment alone is enough to fuel concerns about the ability of schools to meet student needs and keep pace with costs for the near- and long-term.⁶

The CUNY and SUNY institutions of post-secondary public education, particularly community colleges, are in dire financial straits – a problem that began long before COVID-19 and has only been exacerbated by it. The President of the United University Professions, Fred Kowal, noted there have been longstanding funding shortages in SUNY in his testimony on February 4, 2020 at a public hearing before the New York State Legislature’s joint fiscal committees in Albany. He also noted that, at that time, SUNY Plattsburgh and SUNY Cobleskill were contending with \$3 million and \$2 million budget deficits, respectively, and that SUNY Fredonia, SUNY New Paltz, SUNY Buffalo State and the University at Albany were also struggling with budget shortfalls. He added that SUNY campuses are still feeling the impact of budget cuts from the era of the Great Recession (~ 2007-2010), which cut state funding to the University by more than half. Years of flat state funding followed, weakening cash-strapped campuses.⁷ And on July 28, 2020, Robert Megna, the Officer in Charge of SUNY, testified at a Joint Legislative Public Hearing of the New York State Senate Standing Committee on Higher Education and Assembly Standing Committee on Higher Education that the CARES Act of 2020 provided little support to New York-based institutions of higher education or to SUNY hospitals. He detailed how SUNY has taken many actions to manage and mitigate the financial impacts of the COVID-19 crisis to the extent that it can, but at the same time, he projected that the negative impact of COVID-19 on SUNY’s finances as of June 30, 2020 totaled \$400 million, with potential to reach approximately \$1.0 billion.⁸

Perhaps no one can express the extent of the crisis as much as those charged with operating the public schools. New York’s Council of School Superintendents (an organization

⁵ The Coronavirus Aid, Relief, and Economic Security Act, also known as the CARES Act, is a \$2.2 trillion economic stimulus bill passed by the 116th U.S. Congress and signed into law by President Donald Trump on March 27, 2020 in response to the economic fallout of the COVID-19 (coronavirus) pandemic in the United States. Subsequent additional funding provided through federal legislation has provided temporary help, but by no means solved, the massive shortage in funding for public schools in New York.

⁶ “Factsheet: The State of School Aid in Extraordinary Times,” New York State Educational Conference Board, <https://nyspta.org/wp-content/uploads/2020/11/ECB-State-Aid-Factsheet-Fall-2020-v5.pdf> (last visited Feb. 25, 2021).

⁷ See <https://uupinfo.org/communications/uupdate/200204.php> (includes link to Kowal’s written testimony, at <http://uupinfo.org/legislation/pdf/UnitedUniversityProfessions2020-21testimony.pdf>) (last visited Feb. 12, 2021).

⁸ See <https://www.suny.edu/go/vrelations/state/testimony/covid-testimony/> (last visited Feb. 12, 2021).

that rarely lobbies for particular tax policy outcomes) recently wrote to New York Governor Andrew Cuomo, as well as the leaders of the Senate and the State Assembly, urging a temporary tax increase on the rich in order to address the current educational budget crisis, explaining:

[H]eading into the 2021-22 budget negotiations, the Division of the Budget has so far withheld \$300 million from school aid, \$362 million from other education arts funding and warned of the potential for a 20% School Aid cut. Districts have also been informed that full reimbursement for transportation costs incurred in the last school year is not guaranteed.

We do not fault, at this time, the Executive for taking action to stabilize the state budget during an unprecedented fiscal crisis, but if withholdings are converted into permanent reductions, the harmful impact cannot be understated.

...Even with federal aid, the state will likely need to find other sources of revenue to avoid deep cuts and to assist schools in providing the necessary supports and opportunities to get students back on track. According to the Budget Division's mid-year update, the state will see approximately \$9 billion dollar deficits for each of the next three fiscal years and that assumes \$8 billion in recurring cuts to local assistance, including School Aid.

It is unlikely the federal government will provide sufficient aid to avert all these cuts. Therefore, we support calls by political leaders and other advocacy organizations to increase taxes paid by the wealthiest New Yorkers to protect public schools and other essential services from irreversible damage. We urge you to take rapid action to increase revenue.⁹

On top of what was already an underfunded school system, the Executive Budget currently proposed by the Governor would impact New York City schools quite badly. The Chancellor of the New York City Department of Education recently testified as to the current education budget situation, including the following which further details and bolsters the need for more revenue:

Last year, New York State reduced School Aid, and amidst tremendous uncertainty, it is troubling to see that this year's Executive Budget proposes similar action. The Executive Budget proposes to reduce State school aid to New York City by \$800 million, abandon \$180 million in cash owed to New York City, and another \$70 million in reimbursement to New York City charter

⁹ Letter from Charles S. Dedrick, Exec. Director, Council of School Superintendents, to Governor Andrew Cuomo, Senate Majority Leader Andrea Stewart-Cousins, and NY State Assembly Speaker Carl E. Heastie, undated (on file with the Committee).

school costs. It further proposes to eliminate approximately \$20 million in State grants which are supporting DOE’s work to create teacher pipelines in order to ensure that we have high-quality teachers for our future students. Lastly, in the Executive Budget, New York City was excluded from reimbursement for transportation costs incurred during school building closures.

The federal government allocated one time funding for school districts to help with recovery costs, learning loss and other supports for students. However, the Executive Budget uses this as an opportunity to pass even more cuts onto the City. If the Executive Budget’s proposals are accepted, the Department of Education will experience over \$1 Billion in a total reduction of state education funding, and as result, we will not be able to continue to deliver on equity and excellence for all of our students and address the pandemic’s longer-term consequences in our schools.¹⁰

Some may attempt to argue that educational funding is not in crisis, pointing out that in the 2020 New York State budget and under the Governor’s budget proposal for 2021, the overall level of funding to public schools remains roughly the same as it was in 2019. However, such an argument is misleading. A flat budget does not mean schools are in the same position financially, since teacher costs and other costs automatically increase each year. A flat budget means less money for the schools in terms of real expenditures. In 2020, much of the funding from the federal government received by New York State under the CARES Act— which was meant specifically to address the extra costs of dealing with COVID-19, such as remote learning and safety protocols—was instead used to supplant a significant portion of monies that New York State normally allocates to “Foundation Aid” for the educational system from the state’s own treasury funds.¹¹ And in Governor Cuomo’s 2021 budget proposal published on January 19, 2021,¹² much of the federal funding received by New York State under the latest round of COVID-19 relief funding from the federal government (passed in December 2020) would again go toward replacing, rather than supplementing, a large portion of New York State’s own treasury

¹⁰ Joint Legislative Virtual Public Hearing on 2021 Executive Budget Proposal – Topic: Elementary & Secondary Education, Jan. 28, 2021, <https://www.nysenate.gov/calendar/public-hearings/january-28-2021/joint-legislative-public-hearing-2021-executive-budget> (hereinafter “Jan. 28, 2021 Education Budget Hearing”) (last visited Feb. 12, 2021).

¹¹ *Id.* Jan. 28, 2021 Education Budget Hearing. *See i.e.* testimony of Randi Levine, Policy Director at Advocates for Children of New York, <https://nyassembly.gov/write/upload/publichearing/001180/002719.pdf> (“While the federal government allocated funding to schools through the CARES Act in the spring of 2020, New York’s school districts did not see any additional funding because the state budget reduced state aid for schools by an equal amount, through a mechanism known as the “pandemic adjustment”); *see also* testimony of Andrew Pallotta, President of the New York State United Teachers, <https://nyassembly.gov/write/upload/publichearing/001180/002711.pdf> (noting “the one-time federal CARES Act funding (\$1.1 billion) that is being used in the current school year to replace the state school aid cut that was enacted via the “Pandemic Adjustment”) (all websites last visited Feb. 25, 2021).

¹² Information on the Governor’s FY 2022 Budget is available at <https://www.budget.ny.gov/pubs/archive/fy22/ex/index.html> (last visited Feb. 25, 2021).

funds that normally would be allocated to education.¹³ This pattern strongly suggests an over-reliance on federal funding in an area that, under the New York State Constitution, is the responsibility of the New York State Legislature to provide: that is, common schools for education.¹⁴ Utilizing federal relief funds on account of COVID-19 may work as a short term, stopgap approach to help prevent major slides backward in the overall level of funding that New York’s public schools receive. However, that level was already far too low, according to New York’s courts in the Campaign for Fiscal Equity case decided in 2004.¹⁵ In addition, relying on federal funds to address the chronic underfunding of New York’s public schools even before COVID-19, and to address the massive compensatory education costs as a result of lost learning, mental health issues, and other costs due to COVID-19, cannot be a long-term solution to the problem.

Others may attempt to argue that education funding is really a local issue and should primarily be solved at the local level, through such measures as raising local property taxes and channeling those revenues toward local schools. We believe that such argument fails for several reasons. First, New York City’s schools are not funded in that way – which is already a reason why there is a huge disparity between the funding available to public schools in wealthier suburbs versus New York City public schools and less wealthy school districts. Second, property taxes are already notoriously high in many parts of the state, and given the current problems with the economy and high levels of unemployment, we do not believe many localities can afford to raise property taxes. Third, there are state-mandated caps on property taxes that make it impossible in many localities to have a significant enough increase in such taxes to address the current situation. Fourth, relying on localities to address this crisis through property taxes would likely only exacerbate the longstanding and widening gaps between school quality in rich versus poor (or even just middle-class) localities, as many places do not have the property tax value and hence, the property tax base to make a dent in the school funding problem.

Decisive legislative action is needed to avoid a catastrophic funding failure in our state’s public school system. One such action would be to temporarily increase taxes on those most able to shoulder the burden and target the use of the additional tax revenue to address the education funding crisis. That is what the SHARE Act would do.

B. How the SHARE Act Would Change Tax Rates

Section 1 of the proposed legislation would amend subsection (a) of §601 of the New York tax law, which provides a tax table for resident married individuals filing joint returns and resident

¹³ Jan. 28, 2021 Education Budget Hearing, *supra* note 10, testimony of Robert Lowry, Deputy Director of the New York State Council of School Superintendents, <https://nyassembly.gov/write/upload/publichearing/001180/002724.pdf> (describing Governor Cuomo’s state budget and its impact on public schools: “For the state as a whole, the new federal education aid would be partially offset by two proposed reductions in state support... These two reductions would fully offset new federal stimulus allocations for over 70% of the state’s school districts, so that none of Washington’s \$3.8 billion education aid infusion would be left to help those districts pay extraordinary costs they have borne in [dealing with COVID-19].”) (last visited Feb. 25, 2021).

¹⁴ *See supra* note 1.

¹⁵ *Id.*

surviving spouses. The amended tax table would create two additional income brackets and corresponding tax rates. Beginning with tax year 2020, the tax rates would increase each applicable year for the new income brackets. Beginning in tax year 2021 the income brackets and corresponding tax rates are as follows:

Tax bracket	Tax Rate
Over \$2,155,350 but not over \$5,000,000	\$144,905 plus 8.82% of excess over \$2,155,350
Over \$5,000,000	\$395,803 plus 10.9% of excess over \$5,000,000

As drafted, the proposed legislation would apply the highest tax rate to taxable income of over \$5,000,000 beginning in tax year 2021. It would apply to tax years beginning in 2020 and 2021. It does not expressly state whether or not it would apply to later tax years, but the absence of any affirmative statement of application to later tax years, and the press release from Senator Mayer’s office accompanying the SHARE Act when it was first introduced, indicate a sunset in 2021.¹⁶ However, we would suggest that the final bill text make a “sunset” in 2021 more explicit to avoid any misunderstanding or confusion.

Section 2 of the proposed legislation would amend subsection (b) of §601, which provides a tax table for resident heads of household. The amended tax table would create two additional income brackets and corresponding tax rates. Beginning with tax year 2020, the tax rates would adjust each year for the new income brackets. Beginning in tax year 2021 the income brackets and corresponding tax rates are as follows:

Tax bracket	Tax Rate
Over \$1,616,450 but not over \$5,000,000	\$108,584 plus 8.82% of excess over \$1,616,450
Over \$5,000,000	\$407,013 plus 10.9% of excess over \$5,000,000

Section 3 of the proposed legislation would amend subsection (c) of §601, which provides a tax table for resident unmarried individuals, resident married individuals filing separate returns and resident estates and trusts. The amended tax table would create two additional income brackets and corresponding tax rates. Beginning with tax year 2020, the tax rates would adjust each year for the new income brackets. Beginning in tax year 2021 the income brackets and corresponding tax rates are as follows:

Tax bracket	Tax Rate
Over \$1,077,550 but not over \$5,000,000	\$72,166 plus 8.82% of excess over \$1,077,550
Over \$5,000,000	\$418,126 plus 10.9% of excess over \$5,000,000

¹⁶ Press Release: Senators Mayer & Stavisky Introduce the SHARE Act to Protect Public Schools & Universities from Budget Cuts, May 12, 2020, <https://www.nysenate.gov/newsroom/press-releases/shelley-b-mayer/senators-mayer-stavisky-introduce-share-act-protect-public> (last visited Feb. 25, 2021).

As drafted, the proposed legislation would apply the highest tax rate to taxable income of over \$5,000,000 beginning in tax year 2021.

Finally, Section 5 of the proposed legislation appears to extend the tax table benefit recapture provided under subsection (d-1) to taxable income of over \$5,000,000 for tax years 2020 and 2021.

C. Retroactivity

The current language of the bill would apply personal income tax increases (for those New York residents earning more than \$5,000,000 per year) retroactively to the 2020 tax year and to the 2021 tax year.

From a legal perspective, there is precedent to support limited retroactive imposition of tax increases, and we believe there is a compelling argument to support retroactivity in this case. However, the applicable rules are fact-specific and therefore it is not clear that retroactivity would be enforceable in this instance. We discuss that in more detail below. In case retroactivity here is found unconstitutional or otherwise unenforceable, an alternative would be to modify the bill to apply a two-year period that is either 2021–2022 or to a time period that would have no retroactivity at all (a fully prospective period).

From a policy perspective, on one hand, the retroactivity described above may be viewed as important in meeting the goal of *urgently* addressing education funding shortfalls exacerbated by the ongoing COVID-19 crisis, and as equitable in the sense that many very wealthy individuals have profited¹⁷ handsomely from stock market investment appreciation and income in 2020 even while the rest of the economy was, for the most part, devastated and has not yet recovered.¹⁸ On the other hand, such retroactivity (especially to tax year 2020) may be viewed as unfair or harmful to individuals who took the 2020 tax rate into account in making financial decisions.

There seems to be very little case law or scholarship on these questions specifically in the context of an urgent funding crisis being addressed by a state in order to meet the state's duty under its own state constitution – which is the case here. However, there is precedent supporting the ability for new tax laws to apply retroactively without violating the Constitution, particularly when the tax law serves a strong, legitimate and valid state interest as it does here. As stated above though, if the retroactivity of this bill is determined to be invalid as applied to the 2020 tax year (or even the 2021 tax year, although the latter such challenge would seem weak based on case law), then an alternative would be to simply change the years in which the tax change would be effective.

¹⁷ Carmen Ang, “The Rich Got Richer During COVID-19. Here’s How American Billionaires Performed,” Visual Capitalist, Dec. 30, 2020, <https://www.visualcapitalist.com/the-rich-got-richer-during-covid-19-heres-how-american-billionaires-performed/> (last visited Feb. 14, 2021).

¹⁸ Rupert Neate, “Billionaires' wealth rises to \$10.2 trillion amid COVID crisis,” The Guardian, Oct. 6, 2020, <https://www.theguardian.com/business/2020/oct/07/covid-19-crisis-boosts-the-fortunes-of-worlds-billionaires> (last visited Feb. 14, 2021).

1. *U.S. Supreme Court Jurisprudence*

Welch v. Henry, U.S. v. Carlton

We examined U.S. Supreme Court jurisprudence on income tax retroactivity for cases that seem particularly relevant to analyzing the SHARE Act. The case of *Welch v. Henry*,¹⁹ though a relatively old precedent (from 1938), is still good and relevant law and provides an overarching framework for thinking about retroactivity of tax laws. In the *Welch* case, the plaintiff appealed a judgment of a Wisconsin court which had dismissed the plaintiff's claim seeking recovery of a sum of money paid by the plaintiff under protest as an income tax pursuant to a 1935 Wisconsin law. The U.S. Supreme Court held in *Welch* that a tax is not necessarily unconstitutional because it is retroactive; and that "taxation" is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract, but it is a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. The statute at issue was a Wisconsin statute enacted in 1935 levying an emergency relief tax on dividends received in 1933 from Wisconsin corporations. The Court held that such law is not unconstitutional in the sense of denying due process of law simply because such law was imposing a tax in 1935 on income received in 1933. The Court considered the boundaries of the due process clause of the 14th Amendment of the U.S. Constitution, and concluded that, on the question of whether a retroactive tax denies due process of law, it is necessary in each case to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation. Importantly, the Court in *Welch* stated that "recent transactions" to which a tax law may be retroactively applied without violating the due process clause of the Federal Constitution include the receipt of income during the year of the legislative session preceding that of its enactment.²⁰ In our view, the *Welch* case suggests that the SHARE Act can apply retroactively and the taxation on those earning \$5,000,000 is a mere apportionment of the cost of government and not a penalty.

Besides the *Welch* case, one must also consider the controlling U.S. Supreme Court precedent specifically with respect to retroactive tax legislation—*United States v. Carlton*²¹—which would seem to support the retroactivity of the SHARE Act. In *Carlton*, the Court considered whether the retroactive effect of a new amendment for an estate tax deduction violated the due process clause of the U.S. Constitution. The situation in *Carlton* was that Congress first conferred a tax incentive—a tax deduction for certain activity undertaken by an estate—and then, a little over one year later, retroactively narrowed the incentive on the theory that its prior breadth was mistakenly broad. The Court set forth a two factor test for upholding the retroactivity: (1) whether it has a legitimate legislative purpose – that is, "neither illegitimate nor arbitrary"; and, (2) whether that purpose is furthered by rational means.²² In upholding the retroactivity, the

¹⁹ U.S. Supreme Court, 305 U.S. 134, 59 S. Ct. 121 (1938).

²⁰ *Id.* at 148.

²¹ 512 U.S. 26 (1994).

²² *Id.* at 27.

Court in *Carlton* emphasized that the focus is on legitimacy of the action taken by the government, not on its impact on any particular aggrieved taxpayer(s). The Court indicated that a taxpayer's reliance on the tax rules alone is "insufficient to establish a constitutional violation."²³ It further noted that "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."²⁴ In our view, the rationale in *Carlton* would seem to support retroactively of the SHARE Act as well.

2. *New York Jurisprudence*

Case precedents in New York also seem particularly relevant to analyzing the SHARE Act. We summarize and discuss some of the key ones below.

Matter of Replan Development, Inc. v. Department of Housing Preserv. & Development

In New York there is a three-factor test, first articulated by the New York Court of Appeals in *Matter of Replan Development Inc. v. Department of Housing Preservation & Development of the City of New York*,²⁵ to determine whether a retroactive law is constitutional. The three factors outlined in *Replan Development* are:

- 1) The public purpose of the retroactive application.
- 2) The length of the retroactive period.
- 3) A taxpayer's forewarning of the change in law and the reasonableness of the taxpayer's reliance on the old law.

In *Replan Development*, a taxpayer sought to challenge the retroactive application of a change in a tax law in New York State which applied approximately one year retroactively. The petitioner in *Replan Development* commenced renovation of two single room occupancy (SRO) buildings in April 1983 and claimed to be unconstitutionally deprived of due process by the retroactive application of the amended version of Real Property Tax Law § 489,²⁶ which prevented the petitioner from qualifying for the receipt of an attendant tax exemption under the New York City Administrative Code. The Court ruled that the one-year period of retroactivity was not excessive, and that the objectives of the retroactive application—to forestall the loss of SRO housing and to discourage the precipitous eviction of tenants—were valid public purposes. As for the third factor -- reasonable reliance -- the Court found that the petitioner was forewarned that the State authorization for the tax exemption expired on June 1, 1982, thereby calling into question the continued validity of the Administrative Code provision after that date, and that accordingly, the petitioner may not claim he entertained a settled reasonable expectation of entitlement to the City's exemption based upon renovations he did not commence until April

²³ *Id.* at 33.

²⁴ *Ibid.*

²⁵ *Replan Dev. v. Department of Hous. Preserv. & Dev. of City of N.Y.*, 70 NY2d 451, 456 (1987).

²⁶ L 1983, ch 401, eff. June 30, 1983, retroactive to June 1, 1982.

1983. Since the petitioner could not have justifiably relied on the tax inducement as it existed in 1982, application of the particular retroactive provision at issue to the petitioner did not constitute an unconstitutional deprivation of due process.²⁷

Although the circumstances in *Replan Development* are quite different from the circumstances of the SHARE Act, we believe the precedent in *Replan Development* is favorable, overall, when considering the proposed retroactivity to January 1, 2020 in the SHARE Act. We note a key way in which the three-factor standard relied on by New York’s Appellate Division in *Replan Development* varies from the two-factor *Carlton* standard that is often relied on by state courts to determine the constitutionality of retroactive state tax legislation,²⁸ discussed above. On one hand, New York’s due process standard is similar to the *Carlton* standard in that, under both standards, the taxpayer must prove that the legislature lacks a legitimate public purpose for enacting the retroactive statute and that the length of the retroactive period unfairly burdens the taxpayer. However, New York’s *Replan Development* due process standard poses additional difficulty for a challenger compared to the *Carlton* due process standard because in addition to disproving a public purpose and a modest length of retroactivity, a taxpayer must also establish that it reasonably relied on the prior version of the tax law. Requiring a taxpayer to demonstrate to the satisfaction of a New York court the additional factor of reasonable reliance, which has become a determining factor under New York law, creates a higher degree of difficulty for taxpayers challenging retroactive tax laws.

In a sense, the third factor in *Replan Development* – reasonable reliance by the taxpayer on the former tax code – is the hardest of the three to square with the instant situation involving the SHARE Act. In *Replan*, the taxpayer’s reliance was clearly unreasonable because the taxpayer did not commence activities (construction) in reliance on the former tax code until after the former code had ceased to apply. In contrast, in the case of the SHARE Act’s retroactivity, some taxpayers may already have made economic decisions in reliance on what taxation percentages will be applied to their 2020 earnings. To this we offer two responses for consideration. First, the essential holding in *Replan* is the establishment of the three-factor test itself more than how it was applied to the facts of that particular case. Subsequent cases do more to flesh out the meaning of *Replan*’s third factor and should be considered, as we discuss below, when analyzing the SHARE Act. Second, we believe that nonetheless, the equities are in favor of finding that all three factors support the limited retroactive enforceability of the SHARE Act, particularly in light of COVID and the economic crash in its wake.

James SQ. Assoc. LP v. Mullen

In the *James SQ* case,²⁹ a challenge by taxpayers to retroactivity was successful. The New York Court of Appeals reviewed five actions and proceedings challenging the retroactive application of certain amendments to General Municipal Law § 959³⁰ that introduced two new

²⁷ *Supra* note 25 at 457.

²⁸ *United States v. Carlton*, 512 U.S. 26 (1994) (hereinafter “*Carlton*”).

²⁹ *James SQ. Assoc. LP v. Mullen*, 21 N.Y.3d 233 (2013).

³⁰ L 2009, ch. 57, part S-1, § 3.

criteria that businesses must meet to retain their certificates of eligibility for the Empire Zones Program and its state tax incentives. The impetus for the 2009 Amendments was the Governor's Enacted Budget Financial Plan, which stated that reforms were necessary to rein in abuses in the Empire Zones Program by some businesses. The Legislature passed changes to the law in April 2009, and at that time, did not intend for the changes to be retroactive. However, in an August 2010 bill, the Legislature further amended the statute to “clarify and confirm” that the effect of the amendments—revocation of certification of certain businesses—was “deemed to be in effect for the taxable year commencing on or after January 1, 2008 and before January 1, 2009,” even though the 2009 amendment made no mention of retroactivity. In light of these facts, the Court held that the plaintiffs' constitutional challenges to the retroactive application were valid due process clause challenges under the Fifth Amendment of the U.S. Constitution. The Court further held that, while the Fifth Amendment's Takings Clause is but one of many constitutional provisions that express principles of anti-retroactivity, plaintiffs' claims were not valid Takings Clause challenges. The Court stated that the test for whether a retroactive tax violates the due process clause is different from the test for whether a retroactive tax is an unconstitutional taking. The Court noted that an aggrieved taxpayer may choose to make a claim that a retroactive tax violates the due process clause under the multi-factor balancing-of-equities test set forth in *Matter of Replan Dev.* (discussed above). The taxpayer additionally may choose to challenge the statute under the Takings Clause, but must prove that the tax amounted to flagrant abuse and the seizure of property, a more difficult task.

In deciding that the situation in *James SQ* was a violation of due process, the Court applied the *Replan Development* equities balancing test and decided in favor of the plaintiffs. The Court examined the three important factors in determining whether a retroactive tax infringes on a taxpayer's due process rights: namely, (1) the taxpayer's forewarning of a change in the legislation and the reasonableness of reliance on the old law; (2) the length of the retroactive period; and, (3) the public purpose for retroactive application. The Court found that the first factor weighed in favor of plaintiffs as they had no warning and no opportunity at any time in 2008 to alter their behavior in anticipation of the impact of the April 2009 amendments to the law, which would apply retroactively to January 1, 2008. In addition, the Court found that the 2009 Amendments were not meant to cure an unintended error by the legislature, but rather, to increase tax receipts for the state budget. The plaintiffs appeared to have conducted their business affairs in a manner consistent with existing Empire Zone Program requirements in 2008, justifiably relying on the receipt of the tax benefits that were then in effect. The Court also found that the second factor benefitted plaintiffs since the length of retroactivity, regardless of whether the period of retroactivity was deemed to span 16 or 32 months, was excessive. Moreover, on the third factor, the Court found that New York State failed to set forth a valid public purpose for the retroactive application. The Court concluded that the retroactive application of the 2009 Amendments violated the plaintiffs' due process rights.

The holdings in the *James SQ* case are directly relevant to the situation of the SHARE Act. However, the *James SQ* case can also be distinguished on several grounds. Firstly, in *James SQ* the amendments to the law, which were made retroactive to January 1, 2008, were not introduced in the legislature until January 2009, and then the specific changes in implementation of the tax credit program based on such amendments were not announced until August 2010. In contrast, the SHARE Act has its exact changes to tax rates specified and with the same language currently as was first introduced in the Legislature in May of last year (2020), which would apply

to that same tax year and the next one (2021). Moreover, the time period for retroactivity in the *James SQ* case was, depending on how one measures it, 16 or 32 months, but the Court settled on 32 months, which is much longer than the time period under the proposed SHARE Act of 12-18 months (although the Court in *James SQ* noted that even 16 months should be considered excessive). Furthermore, the *James SQ* case is not specifically about personal income tax laws imposed by a state, but rather, about tax benefits to businesses from an economic development zones act under the General Municipal Law.

Finally, there is the question of whether the lack of a “valid public purpose” in the *James SQ* case would present an issue with the SHARE Act under the *Replan* test, in light of the *James SQ* precedent. In this respect, we believe the Court’s reasoning in *James SQ* is not clearly applicable to the SHARE Act. In *James SQ*, the Court stated its reasoning on this factor of the *Replan* test as follows:

The legislature did not have an important public purpose to make the law retroactive. It was not attempting to correct an error in the tax code as in *Carlton*, or to prevent “the loss of [single room occupancy] housing and to discourage the precipitous eviction of tenants” as in *Replan*. The Empire Zones Program's cost to the state budget in 2008-2009 was not an unanticipated or unintended consequence of a previous legislative enactment. The legislature's only purposes were to stem abuses in the Empire Zones Program (increasing the benefits to the public relative to the cost of the credits) and to increase tax receipts. However, retroactively denying tax credits to plaintiffs did nothing to spur investment, to create jobs, or to prevent prior short-changing. The retroactive application of the 2009 Amendments simply punished the Program participants more harshly for behavior that already occurred and that they could not alter.

In contrast to the situation in *James SQ*, the SHARE Act addresses an urgent public purpose: providing critical funding necessary to educate public school students due to the pandemic. The extent and urgency of this need for additional funding could not have been foreseen until well into 2020, and there is a lack of funds from other sources sufficient to address this need.

Moreover, the change is being proposed temporarily, and is reasonably tailored to the underlying purpose of evading a catastrophic failure of the already underfunded public school system. After all, under the U.S. Supreme Court precedent mentioned above—the *Carlton* case—a statute must be supported by a legitimate legislative purpose, and the protection of the public fisc will suffice as such purpose.³¹ The SHARE Act addresses not only protection of the public fisc but also an extraordinary public crisis. The need to respond to a pandemic-caused public health crisis, where schools are literally shut down and revenues are needed for schools to function and students to recover, is all the more compelling when one considers that the duty to provide public schools is enshrined in New York’s Constitution. The *James SQ* precedent is

³¹ *Carlton*, 512 U.S. at 31-32.

easily distinguishable and, in our view, would not pose a problem for the application of retroactivity in the SHARE Act.

Caprio v. New York State Department of Taxation

While some taxpayer lawsuits (such as the *James SQ* above) have succeeded in challenging the application of tax laws retroactively, this result is far from commonplace. In 2015, the New York State Court of Appeals upheld the retroactive application of a New York personal income tax law that taxed nonresidents selling shares in an S corporation. In *Caprio v. New York State Department of Taxation*,³² the taxpayers, who were Florida residents, sold their stock in an S corporation in 2006 and 2007. In conjunction with this sale, the taxpayers and the stock's buyer made a joint IRC Section 338(h)(10) election. For federal tax purposes, this election treated the sale of the stock as a sale of assets. For New York tax purposes, the taxpayers interpreting New York Tax Law Section 632 before its amendment treated the election as a sale of S corporation stock and reported no New York-source gain on the sale. In 2010, New York amended Tax Law Section 632 to require that both residents and nonresidents source gain from the sale proceeds of S corporation stock to New York in accordance with the S corporation's business allocation percentage. The amendment also made the law retroactive to January 1, 2007, some two-and-a-half years before the law's amendment. The amendment's retroactivity captured the taxpayers' transaction and they challenged the law's retroactivity. The Court of Appeals applied the three-factor test to determine whether Tax Law Section 632's retroactivity provision violated the taxpayers' right to due process. The court found that all three factors favored the retroactive application of Tax Law Section 632. First, the court agreed with the DTF that the state's legislature had a valid public purpose³² in enacting the retroactive amendment to Tax Law Section 632. The DTF argued that the purpose of the retroactivity was to correct an error in Tax Law Section 632 and to prevent "significant and unanticipated revenue loss." Second, the court found that the several-year retroactive period (approximately three and one-half years) was not excessive. The court found persuasive the DTF's argument that the time period was designed by the legislature to cover open tax years and to prevent an unexpected loss of revenue.³³ Finally, the court determined that the taxpayers' reliance on Tax Law Section 632 before its amendment was not reasonable. Additionally, the court determined that the taxpayers' interpretation of Tax Law Section 632 contradicted the state legislature's express intent of enacting the law.

In conclusion, we see a strong and valid public purpose for the retroactive application of the temporary tax increase contemplated by the SHARE Act. We believe that current case law supports the retroactive provisions of the SHARE Act. However, as stated above, if retroactivity here is found unconstitutional or otherwise unenforceable, an alternative would be to modify the bill to apply a two-year period that is either 2021–2022 or to a time period that would have no retroactivity at all (a fully prospective period).

³² *Caprio v. New York State Dept. of Taxation and Finance et al.*, 25 N.Y.3d 744 (Court of Appeals of New York, 2015).

³³ *Id* at 757.

D. Permissibility of Earmarking Tax Revenues for Education

Section 6 of the SHARE Act would require the tax funds collected pursuant to the higher tax rates to be “appropriated or transferred only for the general support of public schools.” However, without a mechanism for tracking the revenues generated by the increase in the tax rates, it is not clear how the additional revenues would be protected from the possibility of being diverted to the State’s general fund which may be used for any purpose. The bill provides a bit more detail as to where the additional tax revenues are supposed to go, but not a great deal. Section 4 of the bill would amend §171-a of the New York Tax law to add a new subdivision 3. The new subdivision 3 appears to largely reflect current subdivisions 1 and 2 of §171-a of the current tax law, which deals with provisions that govern the transfer of tax funds to the state Comptroller. Under current §171-a of the current tax law, the Comptroller is required to “pay into the state treasury to the credit of the general fund all revenue deposited.” However, the current tax law also provides that certain excess funds collected are required to be paid by the Comptroller to the credit of the New York State Department of Social Services, New York State Higher Education Services Corporation, and other enumerated entities. That leaves open, to some extent, where the revenues from the SHARE Act would ultimately go. We suggest more specific language to ensure that revenues from the SHARE Act will go to public schools.

As drafted, the proposed legislation would require 85 percent of the incremental tax revenues generated under the increased tax rates to be transferred to the State lottery fund, and the remaining 15 percent would be transferred to in a supplemental higher education fund. The idea seems to be that directing funds into the state lottery fund will help ensure that those funds are spent on public schools (K-12), since by law the state lottery fund must use its net proceeds for that purpose.³⁴ While such language may be sufficient to make sure that a large percent of the revenue goes to a fund that is constitutionally required to support schools in New York, it may be helpful to specify that the revenue shall be spent on Foundation Aid pursuant to Section 3602 of the education law.

As for the manner of assuring that the other 15 percent of the incremental tax revenues generated under the increased tax rates would go toward SUNY and CUNY, the proposal requires such revenues to be deposited into the new, “supplemental public higher education fund” referred to above. That fund is to be created pursuant to Section 7 of this very bill. Moneys of that fund are to be “distributed equally” to SUNY and CUNY “for additional operating support, as appropriated by the state legislature.” No further details, mechanics or logistics are specified for how that fund will be set up, who will administer it, who will be responsible for identifying the exact amount of additional revenues generated as a result of this bill, and on what timeframe.

The above leads to two questions: (1) Is it legal to earmark tax revenues in this manner,

³⁴ N.Y. STATE CONSTITUTION, Art. 1, Sec. 9(1), states in pertinent part: “except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except... [certain exceptions are then listed].” *Available at* https://www.dos.ny.gov/info/constitution/article_1_bill_of_rights.html. *See also* N.Y.S. Lottery website at <https://www.nylottery.org/information/education-aid> (all websites last visited Feb. 14, 2021).

specifically for education? And further: (2) Assuming it is legal to state such an earmark in the law, is it practically enforceable?

Set forth below is our summary and understanding of the legal basis for why tax revenues can indeed be earmarked specifically for education, as this bill would propose. Although we did not find any clear, affirmative precedent formally stating that the New York State Legislature is allowed to earmark funds from tax revenue for a specific purpose, we found some helpful examples of earmarking in the State, which is a common practice. Also, we found ways to best protect the funds which would be gathered by the imposition of this new, higher tax bracket to help ensure use for the intended purpose of public education.

1. *Precedent for Earmarking Funds*

It does not appear that the bill would violate any existing tax law or regulations, because the bill appears to largely amend existing tax law. However, insofar as the bill attempts to specify where the additional tax revenues will go, is that legally binding on the State?

On the question of earmarking funds, although we were not able to find clear examples of cases that detail the legal basis to earmark funds, we did find examples of past practice and related precedent that indicate it is likely permissible for the SHARE Act to earmark funds from the increase in personal income tax on the wealthiest New Yorkers for use for public education.

As a preliminary and practical matter, we note that in many states, including New York, one of the most common uses of earmarking is for educational expenditures, but it is also done in various other areas. As of September 2008, the average amount of earmarked tax funds among the 50 states was less than 25 percent, but varied greatly from state to state; in New York it was approximately 11.1 percent, and included earmarked funds for various purposes serving the public interest, including such things as environmental protection capital projects (per Article 31 of the NY Tax Law), transportation capital projects (per Article 12-A of the NY Tax Law), and local fire departments (per Article 91 of the NY Insurance Law).³⁵

For instance, in the fiscal year budget plan for 2020, both Governor Cuomo and the State Legislature agreed to earmark funds from new taxes on high-value residential properties and internet sales and have these funds go solely towards increasing MTA funding.³⁶ Under the 2020 plan, a “progressive mansion tax” will increase the tax rate on buying properties valued at \$25 million or above, and a new internet sales tax will apply to purchases made by internet marketplace providers.³⁷ These plans demonstrate a precedent and a willingness on the part of the State to raise

³⁵ Arturo Perez, “Earmarking State Taxes,” Nat. Conf. of State Legislatures Fiscal Affairs Program, Sept. 2008, at 2, 78.

³⁶ Press Release: Governor Cuomo and Legislative Leaders Announce Agreement on FY 2020 Budget, March 31, 2019, <https://www.governor.ny.gov/news/governor-cuomo-and-legislative-leaders-announce-agreement-fy-2020-budget> (last visited Feb. 12, 2021).

³⁷ *Id.*

and earmark funds for a specific purpose by, in part, increasing tax rates on the wealthiest New Yorkers.³⁸

Additionally, in *Dalton v. Pataki*, the New York Supreme Court, Appellate Division, Third Department struck down legislation that aimed to divert funds away from education in violation of the state constitution.³⁹ The law in question permitted racetracks to invest some of their net proceeds in breeding funds instead of having those net proceeds go exclusively to education as required by the New York State Constitution (specifically Article I, Section 9(1)).⁴⁰ The State Legislature intended this statute to allow racetrack operators to invest some of their proceeds to benefit horse track racing and the agriculture of the state generally.⁴¹ Despite this intention, the appellate court held that the New York State Constitution does not give the State Legislature discretion to divert state lottery revenue away from education.⁴² The Court reasoned that if the drafters of the State Constitution had wanted the Legislature to have the discretion to divert some State gambling and lottery revenue away from education, then they would have provided for that in the amendment.⁴³ In other words, the Court stressed that the wording of the Constitution does not state that a *reasonable* portion of the State lottery and gambling revenue go towards education, but instead the Constitution states that *all* proceeds exclusively go towards education, which deprives the State Legislature of any authority to divert funding away from education. Thus, the Court found the law to be unconstitutional.⁴⁴

The Dalton case is particularly relevant to any analysis of the SHARE Act because it exemplifies how the State has allowed funds to effectively be earmarked for a specific purpose, such as education by the State Constitution, and how to enforce that earmark. In *Dalton*, the “earmark” was the requirement by law of how the state lottery fund uses its revenues – which is directly relevant to the SHARE Act, since the SHARE Act also relies on the state lottery fund as a conduit to make sure funds ultimately get spent on education.

However, under the SHARE Act, the other 15 percent of the incremental revenues from the tax increase is supposed to be deposited into a new “supplemental fund” created under state law for operational support to SUNY and CUNY. There does not seem to exist any clear, direct precedent detailing the constitutionality and legality of legislation—as opposed to constitutional provisions (such as the state lottery provision)—that provides for tax revenues to be allocated solely to a specific fund. If the matter were litigated, it remains to be seen whether a state court would obligate the Legislature and the Governor to adhere to the terms of legislation such as the SHARE Act with the same rigor as it did in *Dalton v. Pataki* to uphold the New York State Constitution’s lottery fund provision.

³⁸ *Supra* note 36.

³⁹ *Dalton v. Pataki*, 780 N.Y.S.2d 47, 76 (N.Y. App. Div. 2004).

⁴⁰ *Id.* at 74–75; N.Y. Const. Art. 1, §9 (1).

⁴¹ *Dalton*, 780 N.Y.S.2d at 76.

⁴² *Id.*

⁴³ *Dalton*, 780 N.Y.S.2d at 77.

⁴⁴ *Id.*

2. *Ability to Protect Earmarked Funds from Diversion to the General Fund*

As noted above, the bill clearly expresses its intent to provide, and seemingly requires that the additional revenues generated from the tax increase be devoted to, additional educational funding for public schools. However, in our view, the bill does not provide a sure mechanism to ensure that the revenues do not simply disappear into the general fund. It appears that the ultimate decision as to whether additional funding will be provided to educational needs will still be subject to annual budgetary negotiations between the Governor and the Legislature. While the proposed bill creates some solution for creating additional funding for public education, it may be more effective in ensuring the use of such funds for public education if the Legislature would explore the creation of a dedicated revenue stream, perhaps similar in nature to the Metropolitan Transportation Authority (MTA) surcharge, but in this case to fund the education system.

Assuming that earmarking funds raised by the SHARE Act is permissible, then we believe it would be beneficial to put these funds in a figurative “lockbox” to help ensure that the funding is used as intended and does not go into the general fund. Although the current bill states that funds raised from this personal income tax will only be appropriated to support public schools, it may be worthwhile to add greater protections to ensure that these funds only go towards education funding.

To illustrate: in 2018, Governor Cuomo signed into law a transit lockbox bill (A.8511/S.6807, Chp. 465). It was enacted to ensure that taxes and fees raised to fund transit in New York are not spent on other purposes.⁴⁵ The New York transit fund often had much of its funding diverted to other areas of the state budget in times of financial instability, with the transit fund losing \$391 million between 2011 and 2015.⁴⁶ The intent of the transit “lockbox” law is to stop such diversion of funds away from transit by putting the funds in a lockbox.⁴⁷ Under this law, funds can only be taken away from the fund if a new statute is passed to authorize the diversion of the funds along with a memo from the state budget director detailing how much money will be taken from the fund.⁴⁸ In this regard, the transit funds are not completely safe from diversion, but it is more difficult, politically, for funds to be taken away from the transit fund.⁴⁹ This method of putting funds in a lockbox may be worth considering as part of the SHARE Act to ensure that the money raised for education is difficult to divert from its intended purpose.

Another interesting element of the transit lockbox bill is that, when the State budget director announces how much money will be taken from the lockbox fund, the budget director must also detail how the diversion of funding will affect the operation of the public transportation system.⁵⁰ This requirement mandates that the State and the budget director consider how much

⁴⁵ N.Y. Exec. Law § 182(1) (McKinney 2018); Dan Rivoli, “Transit 'lockbox' law signed by Cuomo makes raiding subway funding more difficult,” DAILY NEWS, Jan. 2, 2019, <https://www.nydailynews.com/new-york/ny-metro-transit-lockbox-law-20190102-story.html> (last visited Feb. 12, 2021) (hereinafter “Rivoli”).

⁴⁶ *Id.* Rivoli.

⁴⁷ N.Y. Exec. Law § 182(1); *Id.*

⁴⁸ N.Y. Exec. Law § 182(3); Rivoli, *supra* note 45.

⁴⁹ Rivoli, *supra* note 45.

⁵⁰ N.Y. Exec. Law § 182(3)(f).

harm will be done to the public transportation system if they were to take money away from the transit lockbox.⁵¹ A similar provision may be beneficial to include in the SHARE Act to require that the State be forced to disclose and document how much of a negative impact their diversion of funds from an education lockbox would have on public schools in the state.

In conclusion, earmarked funds can be protected from use in the general fund through a lockbox and requiring certain conditions be met before these funds can be accessed. We recommend that the legislature consider similar measures here to help ensure that funds intended to be used for public education are not diverted to the general fund.

We also recommend that the legislature consider the order and manner in which funds should be released, being mindful of which communities should get it first, and making sure it is done in an equitable way, particularly since the least funded school districts may have especially urgent need.

E. How Much Additional Tax Revenue Would Be Raised?

It is important in evaluating the SHARE Act to estimate how much money this bill, if passed, would raise over two years of higher taxes on those whose income would be subject to the bill. Senator Mayer had initially estimated around the time the bill was first introduced in the Spring of 2020 (this was before the full depth of the coronavirus pandemic's effects on schools and the budget could be known) that if the bill were passed as written, it would raise a little over \$1 billion of additional tax revenue per year. Senator Mayer and Senate Majority staff were very helpful in pointing us to publicly available data sets that can be used to produce estimates of this kind.⁵²

1. Will the Anticipated Additional Tax Revenues Be Offset By Wealthy Taxpayers Leaving the State?

From a policy standpoint, one oft-stated sentiment is that increasing taxes on wealthy New Yorkers will cause them to relocate and change their state of legal residence in order to avoid paying the State's higher taxes. This concern has been raised in the past by Governor Cuomo;⁵³ while he now appears open to consideration of increased taxes on the wealthiest New Yorkers in view of the current financial crisis caused by the pandemic, he still implies a risk of eroding the tax base if taxes are raised at the state level.⁵⁴

⁵¹ *Id.*

⁵² See spreadsheet entitled "Personal Income Tax Filers, Summary Dataset 1 - Major Items by Liability Status and Place of Residence: Beginning Tax Year 2015," <https://data.ny.gov/Government-Finance/Personal-Income-Tax-Filers-Summary-Dataset-1-Major/73iw-kuxv/data> as well as other spreadsheets at <https://data.ny.gov/> (last visited Feb. 14, 2021).

⁵³ See, e.g., Luis Ferre-Sadurni and Jesse McKinley, "Tax the Ultrarich? Cuomo Resists, Even With a \$14 Billion Budget Gap," N.Y. TIMES, Sept. 7, 2020, <https://www.nytimes.com/2020/09/07/nyregion/wealth-tax-budget-billionaires.html> (last visited Feb. 14, 2021).

⁵⁴ Anne Gronewold, "Cuomo Warns of Tax Hikes, Dire Cuts if Feds Can't Find \$15B," POLITICO, Jan. 19, 2021, <https://www.politico.com/states/new-york/albany/story/2021/01/19/cuomo-warns-of-tax-hikes-dire-cuts-if-feds-cant-find-15b-1358381>; see also Letter from Gov. Cuomo to New York State Congressional Delegation, Feb. 4,

We have seen no data to show that one tax increase on New York residents who earn more than \$5 million per year will cause them to flee New York State in numbers significant enough to erode the tax base. It is difficult to ascertain objectively whether the ultra-rich will flee to lower-tax states, especially due to a tax increase that is *temporary* in nature. We acknowledge the concern that the cumulative effect of the SHARE Act and other tax increases on the wealthy could erode the tax base. However, we do not know of quantitative studies that objectively evaluate such a claim. We reviewed academic studies by tax policy experts which have not been able to reach overall conclusions in this regard.⁵⁵

Although we are not in a position to predict the ultimate economic effect of the SHARE Act,⁵⁶ we feel it is worth noting that the relatively short-term duration of the SHARE Act is another reason to doubt how much of an effect it would have on wealthy individuals' choice of state of residence, since it only applies for two years with timing retroactive for a portion of the effective time period.

F. The Issue of Paying a “Fair Share” of Taxes

We researched whether the data supports the assertion underlying the SHARE Act that not all taxpayers in New York are sacrificing equally in this time of COVID-19 crisis – that the burden of paying for public schools has been disproportionately placed on the non-rich, with the rich not paying their “fair share.”⁵⁷

On one hand, some argue that the rich are already paying more than their “fair share” of

2021, <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ltrtocongmembers.pdf> (last visited Feb. 14, 2021).

⁵⁵ For example, the Manhattan Institute commissioned the Siena College Research Institute to perform a survey in 2020 of New York City adults earning at least \$100,000 a year to understand their views on the future of work and the quality of life in the city and their likelihood of leaving; *available at* <https://www.manhattan-institute.org/survey-nyc-high-income-earners-future-work-and-quality-life>. The questions asked seemed to focus on whether individuals were “thinking” of leaving New York City and did not answer the question of whether an increase in taxes on those who earn more than \$5,000,000 per year would affect those peoples’ choice of state of residence. Studies regarding tax flight focused on millionaires in recent years, but reaching no ultimate conclusion, include C. Young & C. Varner, *Millionaire Migration and State Taxation of Top Incomes: Evidence from a Natural Experiment*, NAT. TAX JNL., June 2011, 64, pp. 255-284; the “replication” and response to that study, by R.S. Cohen et al. in PUB. FIN. REV., Vol. 43, 2, pp. 206-225 (June 25, 2014); and, the reply by Young and Varner to that ‘replication’, in PUB. FIN. REV., Vol. 43, Iss. 2 (2015). *See also* Cristobal Young, *THE MYTH OF MILLIONAIRE TAX FLIGHT: HOW PLACE STILL MATTERS FOR THE RICH*, Stanford Univ. Press, 2017 (summary at <https://www.sup.org/books/extra/?id=27987&i=Chapter%201.html>) (all websites last visited Feb. 23, 2021).

⁵⁶ We acknowledge that some detractors of any proposed tax increases, including the SHARE Act, may argue that there is an underlying false assumption that economic activity will continue to grow in New York as it did in pre-pandemic times. Assessing such arguments is beyond the scope of this report.

⁵⁷ From the “justification” section accompanying the SHARE Act: “In such a time, New York State should ensure that sacrifice is shared among those capable of paying, the wealthiest New Yorkers... This bill requires the very small number of New Yorkers earning \$5,000,000 a year or more to do more to help for a limited period... Ultimately, this bill attempts to ensure that sacrifice in the face of the COVID-19 pandemic is shared more equally and proportionally among all New Yorkers.” *Available at* <https://www.nysenate.gov/legislation/bills/2021/s3215> (last visited Feb. 14, 2021).

taxes in New York State. According to a recent Wall Street Journal article citing to data from the state budget office, “[j]ust over half of the roughly \$50 billion New York collects each year of personal income taxes is paid by 188,000 filers – the highest earning 2% of the state’s tax base.”⁵⁸

The percentage of income that is taxed on ultra-rich residents, versus their overall personal income, is important to consider. Studies have shown that, generally speaking, the wealthiest individuals’ income is growing faster than other tax brackets, while they pay a significantly lower effective tax rate than the middle class do, due in part to loopholes and special provisions in tax codes such as the carried interest exemption, as well as the percentage of overall income taxed based on the existing legal definitions of taxable personal income.⁵⁹

After review of both policy sides of this argument, we are of the view that the richest New York resident taxpayers who would be taxed temporarily under this legislation should be taxed in the manner proposed (a modestly higher personal income rate for two years) in order to provide necessary monies during this pandemic, and that this is not an unjust share of taxes under the circumstances since they are in the best position to bear this cost.

G. Considering Other Arguments Against the SHARE Act

1. Will “Throwing More Money at Education” Solve the Problem?

Some may object to the SHARE Act due to a concern that money will not solve the core problems facing New York’s public schools. Various constituencies both inside and outside of schools have competing theories about what ails the academic performance of so many New York public school students compared to their peers in many other states.⁶⁰ According to some, measured achievement outcomes reinforce the notion that New York’s higher spending per pupil, consistently over time, as compared to other states has not been a proxy for school quality. On these grounds, some object to the idea of raising taxes in order to pump more money into the public school system. They point out that New York State already spends far more per pupil than other states do, and that throwing more money at the education system will not necessarily help. Research papers in this regard published by the Empire State Center on Public Policy indicate that, “[s]pending level comparisons cast doubt over warnings of looming calamity. Most significantly,

⁵⁸ Jimmy Vielkind, “New York State Lawmakers Weigh Tax Increase on Wealthy,” WALL STREET JOURNAL, Dec. 16, 2020, <https://www.wsj.com/articles/new-york-state-lawmakers-weigh-tax-increase-on-wealthy-11608124891> (last visited Feb. 14, 2020).

⁵⁹ See, e.g., Charles Marr et al., *Substantial Income of Wealthy Households Escapes Annual Taxation Or Enjoys Special Tax Breaks*, Center on Budget and Policy Priorities, Nov. 13, 2019, <https://www.cbpp.org/research/federal-tax/substantial-income-of-wealthy-households-escapes-annual-taxation-or-enjoys>; Meg Wiehe et al., WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES, Sixth Ed. (Oct. 2018), Institute on Taxation and Economic Policy, <https://itep.org/wp-content/uploads/whopays-ITEP-2018.pdf>. But see Howard Gleckman, *Are U.S. Billionaires Really Paying A Lower Tax Rate Than Working People? Probably Not*, Tax Policy Center – Urban Institute and Brookings Institution, Oct. 11, 2019, <https://www.taxpolicycenter.org/taxvox/are-us-billionaires-really-paying-lower-tax-rate-working-people-probably-not> (all websites last visited Feb. 14, 2021).

⁶⁰ Ian Kingsbury, “On Measuring School Quality, Education Week Misses the Mark,” Empire Center on Public Policy, Sept. 11, 2020, <https://www.empirecenter.org/publications/on-measuring-school-quality-education-week-misses-the-mark/> (last visited Feb. 14, 2021).

if New York was a country in 2016—the most recent year for global education spending data—it would have boasted the highest per-pupil expenditure in the world, even after subtracting 20 percent of state aid.” The report also states: “In the 2017-2018 school year, the most recent year with census data on education expenditures, New York spent \$24,040 per K-12 pupil, almost doubling the national average of \$12,612 and topping the next-closest state, Connecticut, by \$3,405. That year, 39.6 percent of K-12 revenue in New York came from the state. If districts lost 20 percent of that revenue stream, per-pupil expenditures would fall to \$22,136. In such a scenario, New York would still outspend Connecticut by 7.3 percent.”⁶¹

We offer two responses to these objections. First, some data indicate that it is a myth that New York spends more on education than any other state and gets poor results. According to Education Week’s “Quality Counts,” in 2014, New York was fifth highest in per capita spending, adjusted for regional cost differences, and its overall achievement levels were higher than 29 other states and the District of Columbia, and in 2019, New York’s overall achievement levels were higher than 42 other states and the District of Columbia.⁶² And in the latest annual survey by WalletHub of the states with the best and worst school systems, New York was in the top 12 overall, the top 16 in quality, and the top 10 in safety.⁶³ Furthermore, New York’s high average spending masks the fact that the state contains some of the highest spending and highest achieving school districts in the country, but the distribution of education spending is more inequitable than in most other states, and vast numbers of students throughout the state are not being provided a meaningful educational opportunity. Second, New York State’s Constitution requires that all students receive a sound basic education and New York’s highest court has ruled that significant additional funding is necessary to meet this Constitutional mandate. There has been testimony and evidence at numerous public hearings on the subject of funding for public education in New York, from legislators, teachers, educational experts and other groups, making it clear that, in fact, such significant additional funding is critical to provide necessary resources for teachers, students and schools.⁶⁴ This is even truer in the pandemic—when the needs have increased exponentially—but was true well before the pandemic. While funding alone will not be a panacea, it will be a significant help.

⁶¹ Ian Kingsbury, “Even After Aid Cut, New York Will Spend Most on Education, Empire Center on Public Policy,” Sept. 8, 2020, <https://www.empirecenter.org/publications/even-after-aid-cut-new-york-will-spend-most/>. See also E.J. McMahon, “Tax Day 2.0 Marks the End of NY’s Economic Expansion,” N.Y. Post, July 15, 2020, <https://nypost.com/2020/07/14/tax-day-2-0-marks-the-end-of-nys-economic-expansion/> (all websites last visited Feb. 14, 2021).

⁶² “Quality Counts 2014: State Highlights Reports,” Jan. 4, 2014, Education Week, <https://www.edweek.org/education/quality-counts-2014-state-highlights-reports/2014/01>, and “Data: Mapping the States On This Year’s Quality Counts [2019],” Education Week, <https://www.edweek.org/policy-politics/data-mapping-the-states-on-this-years-quality-counts>. For additional years of ‘Quality Counts’ rankings by state, see <https://www.edweek.org/>. For more general research (not specific to New York) showing the large positive effect of school funding increases on educational achievement, see Julien Lafortune et al., SCHOOL FINANCE REFORM AND THE DISTRIBUTION OF STUDENT ACHIEVEMENT, Nat. Bureau of Econ. Research, Working Paper 22011, Feb. 2016, <https://www.nber.org/papers/w22011> (all websites last visited Feb. 22, 2021).

⁶³ Adam McCann, States with the Best & Worst School Systems, Wallet Hub, July 27, 2020, <https://wallethub.com/edu/e/states-with-the-best-schools/5335> (last visited Feb. 23, 2021).

⁶⁴ See *i.e.* Jan. 28, 2021 Education Budget Hearing *supra* note 10.

2. *Is it Fair to Raise Taxes Only on the Rich Without Raising Taxes on Others?*

Some are of the opinion that, from a basic ethical and philosophical standpoint, the burden of higher taxes to address the crisis should not be foisted completely on the rich.

The problem with the above argument is that the real effects of reductions in (and failure to fund) public education have been severely inequitable. Various data show that cuts to Foundation Aid (the Governor has withheld 20 percent of Foundation Aid recently)⁶⁵ disproportionately affect poor children (whose schools tend to rely on it more). Put simply, the wealthiest New York residents have the means to address reduced funding. Wealthier districts with higher property taxes will have more money to allocate to public school funding. Parents in these districts can also consider and access alternatives such as private schools, private tutors, private libraries, etc., and in many if not most cases, they saw their wealth increase over the past eleven months even as the pandemic raged on.⁶⁶ In contrast, vast numbers of New Yorkers were severely hurt economically by the pandemic.⁶⁷ From that perspective, the need to remedy cuts to Foundation Aid seems all the more urgent.

We researched the extent to which cuts to “Foundation Aid” school funding from the State of New York disproportionately affect underprivileged children. To be clear, the currently threatened cuts to Foundation Aid emanating from the Executive are on top of the previous failures of the State to properly and fully fund Foundation Aid which it is required to pay, going back over a decade now. We set forth below a basic summary of the findings on how the underfunding hurts underprivileged children more than children from wealthier families.

⁶⁵ Gary Stern, “NYSUT sues state to prevent looming cuts for education,” LoHud.com, Sept. 16, 2020, <https://www.lohud.com/story/news/education/2020/09/16/nysut-sues-new-york-state-prevent-aid-cuts-schools/5816021002/> (last visited Feb. 16, 2021).

⁶⁶ Martha C. White, “Wall Street minted 56 new billionaires since the pandemic began — but many families are left behind,” NBC News, Dec. 30, 2020, https://www.nbcnews.com/business/business-news/wall-street-s-best-year-ever-why-pandemic-has-been-n1252512?cid=eml_nbn_20201230; Gillian Smith, “New York’s Billionaires Are Doing Just Fine As Coronavirus Rages,” MSN, Oct. 9, 2020, <https://www.msn.com/en-us/money/savingandinvesting/new-yorks-billionaires-are-doing-just-fine-as-coronavirus-rages/ar-BB19S6W0>; Jesse Drucker, “Bonanza for Rich Real Estate Investors, Tucked Into Stimulus Package,” N.Y. Times, March 26, 2020, <https://www.nytimes.com/2020/03/26/business/coronavirus-real-estate-investors-stimulus.html>; Julia Horowitz, “Inequality in America was huge before the pandemic. The stock market is making it worse,” CNNBusiness, June 17, 2020, <https://www.cnn.com/2020/06/17/investing/stock-market-inequality-coronavirus/index.html> (all websites last visited Feb. 18, 2021).

⁶⁷ James Parrott, *Covid-caused economic hardships broadly felt and rising*, The New School Center for NYC Affairs, Oct. 16, 2020, <http://www.centernyc.org/reports-briefs/2020/10/16/cnycas-covid-19-economic-update>; Suzanne C. Brundage & Kristina Ramos-Callan, *COVID-19 Ripple Effect: The Impact of COVID-19 on Children in New York State*, United Hospital Fund, Sept. 30, 2020, <https://uhfnyc.org/publications/publication/covid-19-ripple-effect-impact-covid-19-children-new-york-state/> (all websites last visited Feb. 17, 2021).

a) Cuts to Education Spending Affect Student Achievement Unequally

The relationship between education spending and learning outcomes has been a matter of debate for decades. In a search for a cause of the persistent gap in academic achievement between wealthy and poor students, budget disparities are a frequent nominee.⁶⁸ New York’s system of school funding provides the greatest amount of aid to districts with the least local resources, who often have the greatest student need factors – which means that funding shortfalls impact those districts the most.⁶⁹ Historically, students in these districts are predominantly Black and Brown, and the lack of funding leads to overcrowded classrooms and lack of current textbooks and technology, which in turn contributes to disproportionately lower graduation rates of Black and Brown students.⁷⁰ The formula for “Foundation Aid,” first enacted in 2007-08, supports public schools’ expenditures and serves as the primary source of general-purpose operating aid for most public schools. In 2019-20, it represented approximately 67.3 percent of the total State aid received by districts statewide.⁷¹ School districts with the highest levels of student needs and least local resources are the most reliant on Foundation Aid and the most impacted by the state’s failure to fully fund Foundation Aid. All of New York City’s public schools from K-12 are dependent on Foundation Aid – which has not been fully funded for well over a decade.

The New York State United Teachers, which is the state’s largest teacher’s union for public school teachers, indicated that cutting school aid by 20 percent would deprive New York schools of approximately \$5.2 billion in funding.⁷² Since more state aid goes toward the districts with the least resources, an across-the-board-reduction of 20 percent would disproportionately impact low-wealth, high-need communities. As explained by the Educational Conference Board (ECB):

A universal 20% cut would result in an average loss of \$3,779 per pupil in the 10% of school districts with the lowest combined wealth ratios (a measure of fiscal capacity) and just \$458 per student in the wealthiest 10%. A wealth-adjusted cut is also problematic. Consider that a 20% state aid reduction equates to about \$5.2 billion. With the greatest share of state aid going toward high- and average-need districts, eliminating every dollar of aid for low-need districts (which is not reasonable) would save only \$1.6 billion. Thus, an

⁶⁸ C. Kirabo Jackson, Heyu Xiong, Cora Wigger, *The Costs of Cutting School Spending*, EDUCATIONNEXT, Aug. 4, 2020, <https://www.educationnext.org/costs-cutting-school-spending-lessons-from-great-recession/> (last visited Feb. 14, 2021).

⁶⁹ New York State Educational Conference Board, *Factsheet: The State of School Aid in Extraordinary Times*, <https://nyspta.org/wp-content/uploads/2020/11/ECB-State-Aid-Factsheet-Fall-2020-v5.pdf> (last visited Feb. 14, 2021) (hereinafter “NYSPTA”).

⁷⁰ Marina Marcou-O’Malley, Alliance for Quality Education, *Educational Racism*, http://www.aqeny.org/wp-content/uploads/2018/09/educationalracism_final.pdf (Sept. 2018) (last visited Feb. 25, 2021).

⁷¹ See https://stateaid.nysed.gov/publications/handbooks/handbook_2019.pdf (last visited Feb. 14, 2021).

⁷² Ryan Tarinelli, “Union Sues Over School Funding As NY Faces Budget Deficit,” NEW YORK LAW JOURNAL, Sept. 16, 2020, <https://www.law.com/newyorklawjournal/2020/09/16/union-sues-over-school-funding-as-ny-faces-budget-deficit/> (last visited Feb. 12, 2021).

across-the-board cut would devastate those districts that rely on state aid the most but adjusting for wealth would still hurt poorer districts while having dire consequences for average-need districts. Any reduction in state aid that occurs must be significantly less than 20% overall. The scale of a \$5 billion cut is such that there is no way to distribute it that avoids severe consequences.⁷³

A specific comparison may be helpful to illustrate this point. The school district in Rochester, New York is among those most at risk. Of the 25,000 students in Rochester’s schools, 86 percent are Black and Latino.⁷⁴ Ninety percent of them qualify for free and reduced-price meals, and just 13 percent of elementary school students in the district can read on grade level.⁷⁵ The city has a median household income of just over \$33,000, far below the nearly \$62,000 median for the United States, according to the U.S. Census Bureau. The share of city residents who live in homes they own is 36 percent, compared to 64 percent nationally. Today, the upstate district gets more than 85 percent of its money from the state. Before the coronavirus’ freeze on the economy, Rochester’s schools were reeling from chronic underfunding and gross fiscal mismanagement that were forcing leaders there to make deep cuts. The virus brought even more devastation as lawmakers in New York voted not to increase state aid to districts. On May 7, 2020, the Rochester school board permanently closed five schools, shuttered its program for teenage mothers, and another for Puerto Rican students who fled from Hurricane Maria. Since late last year, more than 300 teachers—one-tenth of its teaching force—have been laid off.

An across-the-board percentage cut to K-12 spending will be devastating to a district like Rochester but will have little impact on the public schools in Pittsford, N.Y., a suburb which sits just southeast of the city, is mostly white, and has a median household income of more than \$116,000.⁷⁶ The 5,000-student district gets more than 76 percent of its money from property tax revenue and only 23 percent from the state.⁷⁷

⁷³ NYSPTA, *supra* note 69.

⁷⁴ Daarel Burnette II, “Devastated Budgets and Widening Inequities: How the Coronavirus Collapse will Impact Schools,” EDWEEK, <https://www.edweek.org/policy-politics/devastated-budgets-and-widening-inequities-how-the-coronavirus-collapse-will-impact-schools/2020/05> (data in article was last updated May 8, 2020) (last visited Feb. 12, 2021).

⁷⁵ *Ibid.* All facts presented in this paragraph are from the same source.

⁷⁶ *Ibid.* Aside from a purely economic / income lens, one should also examine funding disparities in public education from a racial perspective, which is why we include some references to racial demographics here. However, while we recognize that such an analysis is important and should ideally be fleshed out more fully, for purposes of this report we have focused on purely economic data, which we believe makes the point sufficiently on its own for supporting the SHARE Act. However, it would be worthwhile to supplement this report with additional data from other racial, cultural and socio-economic perspectives, and we hope to have the opportunity to do so in the future.

⁷⁷ *Ibid.*

b) The Impact of the Great Recession on School Funding is Illustrative

Some recent history will also help elucidate the effect of funding cuts on education in New York State. The “Great Recession” which hit in late 2007 and 2008 limited state and local governments’ ability to fully fund school districts. New York’s unemployment rate almost doubled (increased from 4.6 percent in 2006 to 8.5 percent in 2010), causing state tax revenues to fall 8 percent from 2007 to 2009.⁷⁸ New York saw a decline in income tax revenues as a result of greatly increased unemployment and lowered sales tax from diminished consumption.⁷⁹ Reduced revenues had a devastating impact on public schools— leading to the state failing to pay a significant portion of the Foundation Aid monies it owed. In the fall of 2009, the U.S. Congress helped relieve the impact of those state aid cuts with federal stimulus dollars under the American Recovery and Reinvestment Act (ARRA).⁸⁰ New York State received approximately \$5.6 billion from the ARRA,⁸¹ helping to stabilize the budgets of the school districts.

Further, the state aid cuts triggered by the Great Recession had a lingering effect on school funding. School districts responded to the financial crunch brought on by the Great Recession by making program cuts and staff layoffs, negotiating contractual concessions and tapping into funds balances.⁸² In 2010-11, the Gap Elimination Adjustment (GEA) was enacted in New York State, to help reduce state support to public schools in order to close the state budget deficits. At its most severe in 2011-12, the GEA cut state aid by \$2.6 billion, which is just half the amount a 20 percent reduction would result in this year.⁸³ This resulted in thousands of layoffs of public school personnel across the state, an increase in class sizes, reduced electives and a reduction in or elimination of extracurricular activities. High poverty districts were the worst affected both in terms of revenue and instructional and non-instructional expenditures.⁸⁴

The economic crisis caused by the coronavirus pandemic which hit New York State in 2020 has similarly caused state revenues to decline dramatically and resulted in significant cuts and threatened cuts to state funding for schools. School funding cuts in 2020 and beyond would likely mean that schools would have to make similar cuts in programs and staff at a time when funding, already drastically insufficient, must increase at a time of unprecedented need due to learning loss, mental health issues, and technological and other health-related costs (including costs to overcome the digital divide during remote learning and to reopen schools safely).

⁷⁸ Rajashri Chakrabarti and Elizabeth Setren, *The Impact of the Great Recession on School District Finances: Evidence from New York*, Federal Reserve Bank of New York – Staff Report No. 534, Dec. 2011, https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr534.pdf (hereinafter “Chakrabarti & Setren”) (last visited Feb. 25, 2021).

⁷⁹ *Id.* Chakrabarti & Setren.

⁸⁰ New York State School Boards Association, *Coping with the Economic Fallout from Coronavirus: Lesson from the Great Recession*, https://www.nyssba.org/clientuploads/nyssba_pdf/Reports/coronavirus-report-04172020.pdf (last updated April 2020) (hereinafter, “NYSBBA”) (last visited Feb. 25, 2021).

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Chakrabarti & Setren, *supra* note 78.

Further cuts to K-12 education funding will have severe and long-term impacts on the availability of essential resources for students at a time when the need is greatest. These impacts will be regressive, falling hardest on the large populations of vulnerable and at-risk students in higher poverty districts. Indeed, the fiscal impact of the COVID-19 crisis is already predicted to be far worse than the recession.⁸⁵ Major actors in New York State education testified at a recent budget hearing as to the inequitable impacts of COVID on higher poverty school districts.⁸⁶ The SHARE Act would help address that inequity.

c) The “Digital Divide” -- Worsened by the Covid-19 Pandemic⁸⁷

Researchers at the Education Law Center, a 48-year old education advocacy organization which is one of the leading advocates for equal education opportunity nationwide, have succinctly illustrated the problem as follows:

The sudden transition from physical classrooms to distanced virtual learning has exposed a longstanding resource gap in school districts, often referred to as the “digital divide.” These deficits include students’ access to computer devices, reliable internet [and Wi-Fi] connections, software, and effective online instructional platforms. With limited or no experience in virtual learning on a mass scale, districts are struggling to adapt to this new reality, especially with regard to students with disabilities. Resource needs are particularly acute in high poverty districts (including New York City) as they include student households lacking in home technology and internet [and Wi-Fi/broadband] connections; a large proportion of students dependent on school for meals and support services; and, in many cases, chronic and severe lack of essential education resources, and tight household budgets, even before the onset of the pandemic.

In New York, for example, households in the state’s poorest districts are less likely to have access to a computer and broadband internet than those in the wealthiest districts...Fifteen percent of households in New York’s poorest districts lack computer access, and 24 percent, or nearly one in four, lack internet access. In contrast, only 7 percent of households in the wealthiest districts lack a computer, and only 11 percent lack internet access.⁸⁸ This “digital divide” means more than twice as many students in poorer districts are likely to have been, in effect, “logged out” from access to continuous

⁸⁵ NYSBBA, *supra* note 80.

⁸⁶ Jan. 28, 2021 Education Budget Hearing *supra* note 10.

⁸⁷ Mary McKillip and David Sciarra, *New York’s Pandemic Adjustment: Depriving Resources to Students Impacted by Covid-19*, Education Law Center, April 24, 2020, https://edlawcenter.org/assets/files/pdfs/publications/NY_Pandemic_Adjustment_final.pdf (hereinafter “McKillip”).

⁸⁸ McKillip *supra* note 87.

instruction, and not just for days or weeks, but for what may be months or as much as a year, during the COVID-19 school shutdown [and remote/hybrid schooling].⁸⁹

The same researchers also provide a piercing insight into the disparate effects of a cut in aid from the state:

In New York City, with a student poverty rate of 63 percent among its 1.1 million students, the state aid cut represents 6 percent of the district's total state aid. On average, the state's poorest 177 districts—those with half or more of their students in poverty—experience a 5 percent state aid cut. Yet, state aid to New York's 195 wealthiest districts is cut by only 1 percent.⁹⁰

These numbers speak for themselves. They show starkly how the effect of COVID-19 deprives poorer students of an education—much less an education of the level required by the New York State's Constitution—while more privileged students are much less effected.

d) Other Burdens of the Pandemic Are Not Borne Equally

School districts in relatively poor areas across New York State (including New York City) face especially serious economic challenges to function now, including limited ability to raise revenues locally and escalating costs, particularly health care and meeting the educational needs of immigrants and students whose primary language is not English. Because of COVID-19, these school districts, more than wealthier ones, have a pressing need for even more resources for the 2020-21 school year than usual if they are to provide the “sound, basic education” required by law under New York State's Constitution. This need is even greater in high poverty districts because students will not only experience significant learning loss but also the trauma and stress of extended separation, loss of family members, widespread unemployment, homelessness, and the absence of significant support services from their schools over a period of months or even a year or more.⁹¹ In New York City, support services before the pandemic were already lacking – with very few social workers or mental health or support workers of any type made available to public school students. There is a need for increased funding, not cuts, due to this greater need in the era of COVID-19.

Policy considerations of equity between rich and poor must also take the macro-view. In

⁸⁹ *Id.* at 1-2. *See i.e.*, Client story, “#WiFi4Homeless: A Virtual Existence with Virtually No Internet,” City Bar Justice Center, <https://www.citybarjusticecenter.org/client-stories/wifi4homeless-a-virtual-existence-with-virtually-no-internet/>. *See also* “Homeless Need Internet Access To Find a Home: How Access to Internet and Technology Resources can Support Homeless Families Transition out of Homeless Shelters,” City Bar Justice Center, May 2020, <https://www.citybarjusticecenter.org/wp-content/uploads/2020/05/Homeless-Need-Internet-Access-to-Find-a-Home-2020-Report.pdf>. The City Bar, in conjunction with the City Bar Justice Center, has launched an advocacy campaign focused on the digital divide and its impact on homeless New Yorkers, *see* <https://www.nycbar.org/media-listing/media/detail/nyc-digital-divide-lack-of-internet-access-in-shelters> (all websites last visited Feb. 14, 2021).

⁹⁰ *Id.* at 4.

⁹¹ McKillip, *supra* note 87.

the long term, public school funding cuts may cost the state much more in diminished economic growth, skills and capabilities to adapt in a rapidly changing world. Funding cuts weaken the future workforce by diminishing the quality of elementary and high schools. They impede state education reform initiatives at a time when producing workers with high-level technical and analytical skills is increasingly important to the state's prosperity. At a time when the nation is trying to produce workers with the skills to master new technologies, to adapt to the complexities of a global economy, and to lead, large cuts in funding for basic education undermine a crucial building block for future prosperity.⁹²

IV. CONCLUSION

We support passage of the SHARE Act. The Share Act is urgently needed to address the already severely underfinanced and inequitable educational funding crisis exacerbated by COVID-19 in New York State. We urge the Legislature and the Governor to make it law, or some version of its basic concepts.

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⁹² John Yinger, *How Equitable is The Education Finance System In New York State?* Policy Brief No. 54/2019, Syracuse University Maxwell School of Citizenship and Public Affairs, https://www.maxwell.syr.edu/uploadedFiles/cpr/publications/cpr_policy_briefs/pb54.pdf (last updated 2019, and last visited Feb. 12, 2021).

⁹³ The Education and the Law Committee is extremely grateful for the invaluable assistance provided by Gafar Zaaloff, a member of the City Bar's Personal Income Taxation Committee.