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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

CAMPAIGN FOR FISCAL EQUITY, et al.,	
Plaintiffs-Respondents,	New York County Clerk's Index No. 111070/93
- against -	
STATE OF NEW YORK, et al.,	
Defendants-Appellants.	

Brief of the Brennan Center for Justice at New York University School of Law as Amicus Curiae Supporting Plaintiffs-Respondents Campaign for Fiscal Equity et al. and Supporting Affirmation

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PRELIMINARY STATEMENT

Defendants-Appellants (the "State") contend that a proper separation of powers bars the state courts from ordering that specific appropriations be made to fulfill the state's constitutional obligations. Brief for Defendants-Appellants at 39 [hereinafter "State's Brief"]. In this brief, the Brennan Center seeks to demonstrate how unique structural flaws in the legislative and budgeting process of New York State have contributed heavily to the State's failure to comply with the Court of Appeals' ruling and are likely to continue to do so. The prudential considerations that would ordinarily urge judicial deference to the legislative process to resolve the present educational funding crisis thus counsel judicial action instead to protect the constitutional rights of New York City's schoolchildren. In the face of the predictable failures of the legislative process to remedy the State's constitutional violations, therefore, the Supreme Court's Order of March 16, 2005, was entirely proper.

INTEREST OF AMICUS CURIAE

The Brennan Center for Justice at New York University School of Law is a national advocacy organization that uses scholarship, public education, and legal action to eliminate barriers to full and equal political participation and to ensure that public policy and institutions reflect and represent the diverse voices and interests that make for a rich and energetic democracy. The Brennan Center's

work includes projects devoted to studying and advocating appropriate reforms of New York State's legislative process and protecting the independent role of the judiciary in upholding federal and state constitutional rights.

The Brennan Center has a strong interest in seeing that the remedial order entered by Justice DeGrasse is upheld to protect the rights of schoolchildren that have not been adequately protected in the State's legislative process. Where structural flaws in the legislative and budgeting process unique to New York State prevent the State from fulfilling its constitutional obligations to New York's school children, the customary judicial deference to legislative and executive authority properly gives way to the judiciary's critical role as guardian of citizens' constitutional rights. The Brennan Center submits this memorandum in the hope that its research on the New York State legislative process and its perspective concerning the role of the judiciary in New York State will be of special assistance to this Court in considering the issues raised by this appeal.

BACKGROUND

For all relevant intents and purposes, the legislative process has unequivocally failed to fulfill the State's constitutional obligations to New York City's schoolchildren. The record in this case indicates that "the State aid distribution system does not provide adequate funding to all districts," Campaign for Fiscal Equity v. State, 187 Misc.2d 1, 83, 719 N.Y.S.2d 475, 529-30 (N. Y.

Sup. Ct. 2001), and, in particular, that "the political process allocates to City schools a share of state aid that does not bear a perceptible relation to the needs of City students." Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 930 (N.Y. 2003) [hereinafter CFE II]. The Court of Appeals expressly noted "a long history of State inaction despite its knowledge of the inadequacy of the education finance system." Id. at 925.

Even more dramatic is the failure of the political branches to address this problem since the Court of Appeals' mandatory ruling in 2003. Notwithstanding the State's assertion that "the State's actions over the past decade show an increasing commitment to the State's system of public education and to New York City's schools," State's Brief at 50, it is beyond dispute that the Legislature and Governor have failed to make any serious attempt to comply with the Court of Appeals' command to "ensur[e]...that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education." CFE II, at 930. Indeed, even by the State's own generous estimate, the Legislature and Governor have appropriated less than one third of the State's own estimate of the City's need (and less than 1/15 of the Supreme Court's estimate). State's Brief at 18.

It is against this backdrop of persistent legislative and executive failure that the Supreme Court's Order must be evaluated. While that court acted fully within

the scope of its customary remedial authority, its injunctive rather than purely declaratory judgment was especially warranted – indeed required – to protect the constitutional rights of New York City's schoolchildren who are left without meaningful representation in New York's legislative process.

ARGUMENT

I. New York's Dysfunctional Legislative Process Provides Unique Justification for the Supreme Court's Mandatory Order

Where severe legislative dysfunction or lack of adequate representation blocks the ability of a group to obtain a remedy through the political process, courts may intervene to effectuate that remedy if necessary to protect constitutional rights. In Baker v. Carr, the Supreme Court required the Tennessee Legislature to comply with the state's constitutional mandate to reapportion, notwithstanding the fact that reapportionment, like appropriations, was an area of legislative prerogative. Baker v. Carr, 369 U.S. 186, 259 (1962) (finding judicial intervention necessary because Tennessee's citizens were "caught up in a legislative straitjacket") (Clark, J., concurring); see also, e.g., Reynolds v. Sims, 377 U.S. 533 (1964) (same); Missouri v. Jenkins, 495 U.S. 33 (1990) (holding that court could order state to raise property taxes).[1]

[1] In particular, the under-representation of specific groups in the political process has been cited to support far-reaching judicial intervention. See United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (factors that "curtail[] the operation of those political

Significantly, when faced with such a political process failure—the Wyoming legislature's refusal for 30 years to fund school construction adequately despite repeated judicial exhortations—the Supreme Court of Wyoming ordered the legislature to fund such construction fully, at an ultimate cost of over $500 million. State v. Campbell County Sch. Dist., 32 P.3d 325 (Wyo. 2001). That court held that it was a proper judicial role in the remedial phase to "help check political process defects" and that when "these defects lead to continued constitutional violations, judicial action is entirely consistent with separation of powers principles and the judicial role." Id. at 332-33 (internal citations omitted). See also Montoy v. State, 112 P.3d 923, 939-40 (Kan. 2005) (ordering the state to spend at least $285 million more on education "in light of the legislature's unsatisfactory response"); Lake View Sch. Dist. No. 25 v. Huckabee, No. 01-836, 2005 LEXIS 356 at **9-10 (Ark. 2005) (Glaze, J., concurring) (arguing that the court should not refrain from acting "because we are suddenly afraid of how our

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processes ordinarily to be relied upon to protect minorities" should trigger "a more searching judicial inquiry"); see also Conservation Force v. Manning, 301 F.3d 985, 998-99 (9th Cir. 2002) (supporting judicial action to protect "unrepresented out-of-state interests" from state action); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (supporting judicial action to protect resident aliens from state action); Anderson v. Celebrezze, 460 U.S. 780, 793 n.16 (1983) (supporting judicial action because "the interests of minor parties and independent candidates are not well represented in state legislatures"). Scholars have further developed this rationale, explaining that judicial action is warranted when "legislation was produced by a profoundly defective process" or "groups...have been unconstitutionally deprived of their fair share of democratic influence." Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 715-18 (1985); see also John Hart Ely, Democracy and Distrust 101-2 (1980) (arguing that "courts should "polic[e] the mechanisms by which the system seeks to ensure that our elected representatives will actually represent").

actions might be perceived, or for some unfounded 'separation of powers' concerns"); Abbott v. Burke, 149 N.J. 145, 202 (1997) (ordering the state to spend at least $248 million more on education, holding: "In light of the constitutional rights at stake, the persistence and depth of the constitutional deprivation, and in the absence of any real prospect for genuine educational improvement in the most needy districts, that approach [i.e., waiting for the legislature to act] is no longer an option."). In each of these cases, the court crafted a specific mandatory remedy because of continued political process failure, despite the fact that such a remedy required appropriations by the state legislature.

Commentators and courts have also expressly recognized the under-representation of low-income school districts in the legislative process. See, e.g., Note, Unfulfilled Promises: School Finance Remedies and State Courts, 104 Harv. L.Rev. 1072, 1087 (1991) ("The underrepresentation of the school finance plaintiff's interests in the legislative process" due to the "disproportionate political power of high-wealth districts" supports a "process-based argument for an active judicial posture in the remedial phase."); Catherine Ross Fuller, Access To Education: A Constitutional Right, 51 U. Cin. L. Rev. 819, 836 (1982) (separation of powers argument should not preclude judicial intervention in school funding "because it ignores the role of the Court as the protector of those groups to whom the political processes are unavailable"); San Antonio Indep. Sch. Dist. v.

Rodriguez, 411 U.S. 1, 123-4 (1973) (Marshall, J., dissenting) ("The disability of the disadvantaged class in this case extends as well into the political processes upon which we ordinarily rely as adequate for the protection and promotion of all interests.").

As explained below, New York State's legislative process not only deprives New York City's schoolchildren of sufficient representation but also prevents a reasonable funding compromise from being reached to attempt to remedy the State's constitutional violation. Not surprisingly, that process created the unconstitutional school funding scheme in the first place and has produced the State's continued defiance of the Court of Appeals' ruling. Under such circumstances, prudential considerations weigh in favor of judicial action to protect established constitutional rights left entirely unprotected by the political process.

A. The Interests of New York City's Schoolchildren Are Not Adequately Represented in the State's Political Process

The manner in which the State has failed to address the Court of Appeals' ruling demonstrates the specific process defects that support judicial action in this case. These defects begin with the budgeting process, which effectively prevents adequate representation of the interests at stake here. As has been well-documented, the New York State budget is formulated each year in a process "commonly referred to as 'three men in a room.'" Campaign for Fiscal Equity v.

State, 719 N.Y.S.2d at 533. In this process, the details of the budget have traditionally been worked out behind closed doors by the Governor, the Senate Majority Leader, and the Speaker of the Assembly (the "three men"), who then present the budget deal to the rest of the legislature and the state essentially as a *fait accompli*.

Although there nominally exists a formula whereby school funding levels are calculated on the basis of need (and even this formula was found "not accurately [to] account for the costs of education caused by large numbers of at-risk students in a single district"), in practice "the formulas are manipulated to conform to budget agreements reached by the Governor, the Speaker of the State Assembly, and the State Senate Majority Leader." Id. at 530, 532. The trial court found that:

> The evidence at trial demonstrated clearly . . . "that the formulas are annually 'worked backwards' until the politically negotiated 'share' for the City schools is hit in the calculations. In this context, the data feeding into the school aid formulas for New York City is really of no practical consequence whatsoever – the City will get the negotiated share of aid regardless of what data they report."

Id. at 533 (quoting testimony of State Comptroller).

As a result, no party that might reasonably be said to represent the interests of the City's schoolchildren – not rank-and-file legislators, not the public, nor even the State Education Department officials that administer the school system – have meaningful input into final school funding decisions. In the budget negotiations

after the Court of Appeals ruled, the three political leaders met behind closed doors and emerged "badly divided," without an agreement on school funding. State's Brief at 43. On August 10, months after the budget was due, and still divided, the Legislature finally passed an emergency appropriations measure that allocated far less to New York's schools than any of the three had proposed – an amount that bore no relationship to even the State's measure of their assessed need. With respect to the most recent budget negotiations, the State does not even claim – nor could it – that the amount of funding appropriated for New York City's schools bore any connection to a need-based formula. In short, even since the Court of Appeals issued its mandatory ruling, the budget process in Albany – and the final outcome of that process – has not been based on the actual needs of the New York City schools at issue and has not allowed direct representation of those needs in the negotiations.

This systemic failure of direct representation in the budget process reflects features of the State's legislative process as a whole. First, New York's committee system has been largely moribund for many years, depriving both rank-and-file legislators and the public of an important forum to ensure that the legislation that is passed incorporates fully the interests of the affected communities. In most legislatures, committees "are the locus of most legislative activity." Abner J. Mikva & Eric Lane, Legislative Process 207 (2d ed. 2002). Committees enable

legislators to develop bills and to solicit public and expert feedback on them, and to build public and legislative momentum behind popular measures. In New York, however, the committees do not generally use public hearings, reports, or amendments to incorporate input from the public or from legislators who represent affected communities.[2] Other structural features of the Legislature's committee system, including the permitting of "proxy voting" in the Senate—which is permitted by only five other legislative chambers in the country—and the fact that the Speaker and, to a lesser extent, the Majority Leader, hold hire-and-fire power over committee staff discourage the independent development and the debate of legislation in committee. New York State Legislative Process, at viii. What would normally be a major venue for New York City's parents and advocates for the City's schoolchildren to advance their arguments and provide concrete figures of their districts' needs is thus effectively foreclosed.

Second, numerous obstacles to bringing bills to the floor of the Senate or Assembly discourage public debate and legislative deliberation even on legislation supported by a majority of New Yorkers and their legislators. New York's

[2] From 1997 through 2001, only a miniscule percentage of bills – 0.7% of the major bills passed by the Senate and 0.5% of those passed by the Assembly – were the subject of public hearings in committee. Jeremy M. Creelan & Laura M. Moulton, The New York State Legislative Process: An Evaluation and Blueprint for Reform viii (2004), at http://brennancenter.org/programs/downloads/albanyreform_finalreport.pdf [hereinafter New York State Legislative Process]. The committees seldom issue committee reports, another important mechanism to ensure that the full chamber receives the benefit of the committee's work: during the same period, none of the major bills passed by the Senate and only 1.1% of the major bills passed by the Assembly were the subject of committee reports. Id.

Legislature has more barriers to getting bills out of committee than any other state legislature in the country. Lost in the Shadows: The Fight for a Senate Vote on Wetlands Protection Legislation 4 (2005) at http://www.brennancenter.org/programs/downloads/Wetlands%20Report.FINAL.pdf [hereinafter Lost in the Shadows]. In the Senate, it is impossible for the members of a committee to force a vote on a bill without the chair's consent. Id. at 5. Despite recent changes in the rules, even if a bill makes it out of committee, the Senate and Assembly leadership have complete control over their respective legislative calendars. New York State Legislative Process, at 3. The Senate and Assembly leadership also possess a variety of other unique procedural devices to kill even popular legislation.[3] Lost in the Shadows, at 5.

Such unilateral control, when combined with other procedural flaws, discourages debate and legislative review by the full chambers and their members.[4] Taken together, these features of the political process in New York State systematically limit the roles played by rank-and-file legislators and members of the public in the legislative process, and effectively foreclose the opportunity for

[3] This power is demonstrated by the fact that every bill which was allowed to reach the floor in either chamber during the periods studied by the Brennan Center (out of 7,109 bills considered in the Senate and 4,365 in the Assembly) was approved; only bills of which the leadership approved were allowed to come to a vote. New York State Legislative Process, at ix-x.

[4] Over 95% of the major legislation in both houses from 1997 to 2001 was passed with no debate at all. In another indication of the lack of debate, not one of the 308 major bills from 1997 to 2001 was amended on the floor of either chamber. Moreover, none of the amendments that were made was debated on the floor of either chamber. New York State Legislative Process, at xi.

New York City's public schoolchildren or their representatives to affect the legislative process.

Partly as a result of such procedural rules, moreover, the Republican Senate leadership does not need the vote of a single New York City senator to pass legislation in its house, or to kill legislation proposed by representatives from New York City. Thus, it has been possible for representatives from districts outside New York City – including the Majority Leader (R-Rensselaer) – to block passage, and even consideration, of legislative initiatives that would attempt to ensure adequate education funding to New York City schools.

B. The Paucity of True Conference Committees in Albany Makes Legislative Gridlock Almost Inevitable

Unlike many other legislatures and the U.S. Congress, the New York State Legislature has not employed conference committees as a matter of course to reconcile differences between bills passed by the two chambers. With few exceptions, to pass a bill into law in New York, one chamber must move to substitute the other chamber's version of the bill for its own. If such perfect agreement is not possible – the predictable outcome in most cases – no final bill is passed into law. This feature, in combination with the lack of floor debate and dearth of opportunity for meaningful amendments, eliminates the most common mechanisms for political compromise in other legislatures. As a result, New York

does not have an established means to reconcile what are often dramatically different versions of controversial legislation, budgetary or otherwise.[5]

When combined with the fact that the Republican Senate leadership does not need any New York City votes to defeat legislation proposed by representatives from New York City and can prevent any such legislation from even reaching the floor, the rare use of conference committees effectively means that New York City's children (and their parents) have literally no tools to force a compromise education budget. Were there such an established method for political compromise, competing versions of school-funding plans from the Senate and Assembly could be resolved, producing legislation that, while not perfect, could at least seriously ameliorate the funding status of New York City schools and pave the way for future gains. As it stands, however, the political process is hopelessly deadlocked on this issue and has been for many years. Judicial intervention is necessary and proper to remove this effective "legislative straitjacket" that has resulted in continued stalemate and plain violation of the New York State Constitution. Baker, 369 U.S. at 259.

[5] In 2005, for the first time in decades, both chambers used conference committees to negotiate portions of the State's budget. While laudable and significant as a first step toward changing the established "three men in a room" budget process, it remains to be seen whether this step will become an institutionalized part of the budget process or simply a transient initiative. More importantly, such conference committees made no effort to produce an educational funding compromise this year to address the Court of Appeals' ruling.

C. The State's Open Defiance of the Court of Appeals' Order Is Unique Among Similar Cases and Must Be Remedied

The singular dysfunctionality of the political process in New York is further demonstrated by the unique posture of this case: in no other state have the Legislature and Governor so blatantly ignored a direct ruling by the state's highest court requiring additional educational funding. In those cases cited by the State to demonstrate judicial restraint – Hoke County Board of Education v. State of North Carolina, 599 S.E.2d 365 (2004) and Hancock v. Commissioner of Education, 822 N.E.2d 1134 (2005) – the courts' holdings were predicated explicitly on a finding that the political branches had made serious, albeit incomplete, efforts to comply with the court's prior ruling. See Hancock, 822 N.E.2d at 1138-39; Hoke, 599 S.E.2d at 394.[6] Here, there could be no such finding because the State has effectively ignored the court's ruling.

There has been ample time for the political process to address the State's constitutional violations, were it able to do so. That it has not done so is the predictable result of a dysfunctional and, with respect to New York City's schoolchildren, inadequately representative legislative process. Nor is there any

[6] Notably, in Hancock, the trial court charged with enforcing the Massachusetts Supreme Court's decree cited the approach of New York's courts in handling this litigation as a model for judicial conduct. Hancock v. Driscoll, No. 02-2978, 2004 Mass. Super. LEXIS 118, 494-495 (Mass. Super. Ct. 2004) ("I recommend that the court follow the path that the New York Court of Appeals has recently chosen in a case concerning the adequacy of education provided in the New York City public schools." (citing CFE II)).

indication that, given additional time by the courts, the State would come any closer to providing a sound basic education to New York City's public schoolchildren. The repeated failure of the political process to remedy the constitutional inadequacy of the State's funding for New York City's schools thus renders the Supreme Court's order in this case both necessary and appropriate.

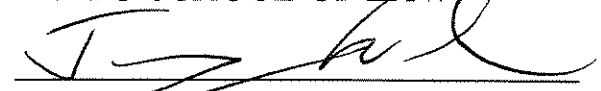
CONCLUSION

For the foregoing reasons, the Supreme Court's order of March 16, 2005, should be affirmed.

Dated: New York, New York
August 31, 2005

Respectfully submitted,

BRENNAN CENTER FOR JUSTICE AT
NYU SCHOOL OF LAW



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[7] Not Yet Admitted.

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